Supreme Court, U. S.
FILED
JUN 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ~~79-2029~~

A. A. HOEHLING, *Petitioner,*

v.

UNIVERSAL CITY STUDIOS, INC.

and

MICHAEL MACDONALD MOONEY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
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THE SECOND CIRCUIT

The petitioner A. A. Hoehling respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 25, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (A-1). The opinion of the District Court for the Southern District of New York is not reported at and appears in the Appendix (A-17).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 25, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Involved in this case is the Copyright Act of 1909, 17 U.S.C. §101 and Rule 56, F.R. Civ. P. Also relevant are the 1976 Amendments to the Copyright Act, 17 U.S.C. §§101, 106(2), 107 and 501.

QUESTIONS PRESENTED

1. Can an author of an historical work maintain a copyright infringement action against one who copies his work where the wrongful appropriation amounts to less than "wholesale usurpation" of the author's expression by a "virtually identical" work?

2. Does the literary expression protected by the copyright laws of the United States include a nonfiction author's historical interpretation and analysis, his plot or story line, the fruits of the author's original research, the author's selection and arrangement of facts, his marshalling of the evidence and structuring of his material, and/or his publication of disparate facts?

3. Has the Court of Appeals for the Second Circuit improperly converted factual defenses regarding copying and wrongful appropriation into legal defenses?

4. Should the well developed doctrine of "fair use," now codified in 17 U.S.C. §107, for balancing a historical author's rights against the public's right to use his work, be abandoned and replaced by a threshold test, denying copyright protection for historical works?

5. If the Court adopts a threshold determination denying copyright protection for the fruits of a nonfiction author's original research, is that author's action against another author for misappropriation preempted by the United States copyright laws?

6. Can the United States District Courts and Courts of Appeals resolve factual issues on motions for summary judgment in copyright infringement actions?

STATEMENT OF THE CASE

This is an action for copyright infringement brought by the petitioner, A. A. Hoehling ("Hoehling"), author of Who Destroyed

The Hindenburg?, against Universal City Studios Inc. ("Universal"), producer of the movie The Hindenburg and Michael MacDonald Mooney ("Mooney"), author of the book, The Hindenburg. The complaint was filed in the United States District Court for the District of Columbia against Universal but was transferred to the Southern District of New York after plantiff failed to secure personal jurisdiction over the defendant Mooney when he was added as a defendant. 1/ Prior to that transfer the District Court in the District of Columbia denied Universal's motion for summary judgment stating:

> "In its Motion for Summary Judgment, defendant Universal City Studios, Inc. contends that plaintiff's 'theory' concerning the Hindenburg's sabotage is not protected under the copyright laws, that there is no substantial similarity between plaintiff's book and defendant's movie, and that the doctrine of fair use is a bar to this action. While there may be merit in defendant's position, questions of similarity, copying, and use are ordinarily not appropriate matters for summary judgment in infringement

---

1/ The claim was brought under the pre-1976 Copyright Act, 17 U.S.C. 101. The cause of action is now set forth in 17 U.S.C. 501, et. seq.

> cases. Despite recent developments in copyright law away from a rigid approach to summary judgment, trial by affidavit or by judicial analysis is still not favored. See 6 J. Moore's Federal Practice ¶56.17 [15] (1976); Nimmer on Copyright § 138 (1975). Discovery to date in this suit has made it clear that there are genuine issues of material fact in dispute. Accordingly, defendant's Motion for Summary Judgment must be denied."

In the Southern District of New York defendant Universal renewed its motion for summary judgment and after further discovery the defendant Mooney also moved for summary judgment. The Court granted the motion of the defendant Universal and the defendant Mooney for summary judgment, and plaintiff appealed. The Court of Appeals for the Second Circuit affirmed on March 25, 1980.

The plaintiff's book, Who Destroyed the Hindenburg?, was published by Little Brown Company in 1962 and a certificate of copyright was issued. In 1972 Dodd, Mead and Company (Dodd, Mead) published a book by the defendant Michael MacDonald Mooney, The Hindenburg. Bantam Books Inc. published Mooney's book The Hindenburg in paperback form in 1973 and 1975.

The derivative movie rights to the Mooney book were sold by Mooney and Dodd, Mead to the defendant Universal and the movie "The Hindenburg", based on Mooney's book, The Hindenburg, was released in December of 1975. The contract between Universal and Mooney and Dodd, Mead provided that Universal would pay for promotion of the Mooney book and that additional compensation would be paid to Mooney based upon the volume of sales of the Mooney book. As indicated above, this action is based upon the infringement of plaintiff Hoehling's book, Who Destroyed the Hindenburg?, by Mooney's book, The Hindenburg and Universal's motion picture, "The Hindenburg".

A. Hoehling's Book, Who Destroyed the Hindenburg?

The Hoehling book, Who Destroyed the Hindenburg?, designated non-fiction, was written by Hoehling based upon substantial research. Hoehling wrote an original story substantially different from the historical view of the destruction of the Hindenburg which suggests the possibility that the Hindenburg was sabotaged by a crew member of the Hindenburg, Eric Spehl, as part of an anti-Nazi plot.

Elements of Hoehling's story relevant to this case can be outlined in brief as follows:

Rigger Eric Spehl is the saboteur; the purpose of the sabotage is the furtherance of an anti-Nazi plot; Eric Spehl has a mistress, Hilda Schmidt who participates in the conjectured sabotage plot and who anticipates the event; Eric Spehl uses a small bomb containing photographic equipment, flashlight batteries, and a small timer; the bomb is "hidden within the folds" of Gas Cell 4; and the stage for the sabotage is set in a bar known as Heldenkeller.

In addition, the sabotage plot is the subject of the investigation of Major Hufschmidt and involves Colonel Erdman, Major Witt and Lieutenant Hinkelbein; a suspenseful counterplot involves a letter written by Kathie Rauch and involves her roomer George Pfister; and a subplot involves detectives Johnson and Ballenstadt in their surveillance of the Hindenburg flight.

The accepted view of the destruction of the Hindenburg, both before and after Hoehling's book, is summarized by a letter from Dennis Mulligan to Mr. Hoehling on April 19, 1972. (J.A. 382)

> "On this point it is to be understood that the American report in essence is a legal document authorized by a Federal statute enacted in 1934. Consequently it had to fairly reflect the evidence adduced in the course of our investigation. No probative evidence, oral or physical, was found or submitted to support an affirmative finding of sabotage as a probable cause of the Hindenburg accident. Nor, in my recollection, did the German report contain an affirmative finding on the same point."

Hoehling wove his own story (outlined above) questioning this historical view and presenting a dramatic possibility that the Hindenburg was sabotaged in the specific manner set forth by him. In doing so, Mr. Hoehling exercised creative functions of an author.

The originality of Mr. Hoehling's work was supported by the affidavits submitted to the Court in opposition to the defendants' motions for summary judgment. John Toland, historian and author stated:

> "4. That in my extensive research I interviewed scores of dirigible experts and other persons directly involved with the Hindenburg; and that not one person gave any credence to a possibility of sabotage similar to that set forth in Mr. Hoehling's book, Who Destroyed the Hindenburg?
>
> 5. That in his well-researched book Mr. Hoehling sets forth an original and

> detailed story about the possibility of sabotage."

And, Dale M. Titler, author of an anthology in which he copies the Hoehling story in a book also published by Dodd, Mead stated (See Argument IV infra.):

> "3. That the following portions of my book, Wings of Mystery, contained in Chapter 13, were based entirely on Mr. Hoehling's book Who Destroyed the Hindenburg? Mr. Hoehling's book was the only source for the text of the Spehl sabotage story."

B. The Mooney Book, The Hindenburg

Mooney received his assignment to write The Hindenburg from Dodd, Mead on January 25, 1971. At that time his editor with Dodd, Mead, Thomas Lipscomb, gave him a copy of Dale M. Titler's Wings of Mystery. As shown in Mr. Titler's Affidavit, Wings of Mystery was copied from Hoehling and contained some of the elements of the Hoehling book set forth above [Hoehling had no knowledge of the Titler book until these proceedings].

By Mooney's own admission, he had his book, The Hindenburg, organized by April 1, 1971, and submitted an outline to Dodd, Mead on that

date. Mooney's completion of the outline of his books coincided with the time that he secured Hoehling's book from the Smithsonian Institution in mid March 1971. He admitted copying much of the material from Hoehling's book into those outlines and into his book and acknowledged the existence of a 51 page digest of Hoehling's book.

While the full extent that Mooney's outline was taken from Mr. Hoehling's work can be seen only by reading the complete outlines, an examination of one page of the outline, indicates the degree of copying:

1. Hoehling, p. 223:

> "He was withdrawn, quiet, even 'eigenartig' (odd) by the measurement of some, including Helmut Lau."

Mooney outline: (See Mooney text p. 210)

> "According to his fellow crew members, Eric Spehl, 27, Goschweiler, Baden, was: 'An odd fellow.'"

2. Hoehling, p. 224:

> "...that Bauer, for one, had asked of a colleague, 'How can Eric Spehl afford such expensive photographic apparatus?'"

Mooney outline: (See Mooney text p. 211)

"Kurt Bauer, assistant navigator, wondered 'How can Eric Spehl afford such expensive photographic equipment?'"

3. Hoehling, p. 223:

"When he was seventeen, however, he journeyed the eighty-odd kilometers east to Markdorf, near Friedrichshafen, where for three years he worked as a saddler's apprentice. However, his training completed, Eric could not find employment. He wandered from town to town, doing an unending assortment of jobs for more than two years until finally he enlisted in the Reich's labor corps."

Mooney outline: (See Mooney text p. 208)

"At 17 Eric Spehl had started work as a saddler's apprentice. After his three year's training he could not find a steady job. For more than two years he wandered from town to town taking odd jobs until he finally enlisted in the Reich's new labor corps. He didn't like it."

4. Hoehling, p. 223:

"After serving a one-year commitment with this corps and witnessing close at hand, for the first time, Nazi cold efficiency and brutal discipline, Eric was only too glad to be a '<u>Wandervogel</u>' or intinerant laborer again. Returning to Lake Constance in 1933, he finally put to use his skill with needle and thread at the Zeppelin works, helping to maintain the <u>Graf Zeppelin</u> and to build the <u>Hindenburg</u>.

In 1936 Spehl became a member of the crew of the newest dirigible. . ."

Mooney outline: (See Mooney text p. 209, 210)

> "After a year with the labor corps, he went back to itinerant labor again, finally getting a job in 1933 at the Zeppelin works in Friedrichshafen on Lake Constanz. He was skillful with needle and thread, sewed the gas bags on the Graf Zeppelin, helped to build The Hindenburg, became a rigger on The Hindenburg when it sailed in 1936."

5. Hoehling, p. 18:

> "He was in the company of a woman, an acquaintance of some weeks' standing, a brunette of rather heavy proportions, with deep-set, brooding eyes. She had been married previously, and was at least six years Eric's senior. A lover had died in Spain the past winter fighting with the International Brigade."

Mooney outline: (See Mooney text p. 100)

> "Around Christmas 1936 he fell in love with 'Brunhilde.' She was seven years his senior, dark, moody, divorced. Her lover had just been killed while serving in the International Brigade in Spain."

6. Hoehling, p. 18, 19:

> "His curiosity continued to be mildly pricked by the association of Spehl and this woman -- a woman who in this documentary must go under the pseudonym 'Hilda Schmidt.' Lau, like other Germans of 1937, had several responsibilities. And one was to keep an eye on suspected Communists."

Mooney outline: (See Mooney text pp. 100, 101)

> "She handled Eric Spehl as if he were a boy. Not only fellow crew members, but the Gestapo followed their affair with interest. 'Brunhilde' was on the 'suspicious' list."

7. Hoehling, p. 123:

> "The Reederei offices were besieged with anguished inquiries, though among the first to appear was someone with admittedly realistic concern. This was Frau Schmidt, who wondered about collecting the insurance she said would accrue to her on the death of Eric Spehl."

Mooney outline: (See Mooney text p. 252)

> "When news of the disaster reached Germany, when the widows began their keening, 'Brunhilde' appeared at the Company offices to demand the insurance on Eric Spehl be paid to her. It was not."

8. Hoehling, p. 182:

> "In the meanwhile, she had fled to Austria -- Vienna, some said -- and . . ."

Mooney outline: (See Mooney text p. 263)

> "She moved on to Vienna, then disappeared."

Also contemporaneously with writing the outline of April 1, 1971 Mr. Mooney visited Vice Admiral Rosendahl who had been commander of Lakehurst Naval Air Station at the time of the destruction of the Hindenburg. Admiral Rosendahl stated that it appeared that Mooney's story had already been written.

After submission of the April 1 outline, Mooney went to Europe, allegedly to research his

book. But Klaus Pruss, son of Max Pruss, Captain of the Hindenburg, stated in a letter to Hoehling that Mooney did not seek information relevant to Hoehling's story:

> "I did not mention the Spehl and "Hilda" theory. Therefore, what he wrote about those two he must have taken from you and probably has enriched with some fantasy.

Mooney admitted that he took passages from Mr. Hoehling's book and that he digested and annotated that book. Specific passages from Hoehling's, Who Destroyed the Hindenburg? can be traced into Mooney's notes, outlines and book, The Hindenburg from his deposition testimony: Mooney Deposition, Page 220; See Mooney pp. 98, 99:

> MR. EASTMAN: On the record. Back to Exhibit 1-E.
>
> Q "Sunday night, May 2nd." First paragraph: "After the crew have finished at the airship, many go to the Heldenkeller -- smoky, beery, photos of German aviation's immortals on the walls."[3/]

3/ Hoehling's book at p. 17: "For the bachelors, the dimly lit Heldenkeller, with its smoky, beery atmosphere and the photographs of aviation's immortals on the walls...."

Does that roughly correspond to Page 98 of the paperback?

A Right.

Q And what is your source?

A Hoehling.

Mooney Deposition, Page 265; Mooney p. 205, 206:

Q Last two sentences:

"Eric Spehl is having nightmares. Steward Nunnenmacher wakes him: 'Was gibt?'"

Source?

A That source is Hoehling in that case, or Titler as well. I am not sure if it is in Titler. 4/

Mooney acknowledged his notes on Hoehling:
Mooney Deposition, Page 291:

Q Page 2, is that an annotated Hoehling?

A Yes.

Q Page 3, is that an annotated Hoehling?

A Yes.

Q Page 4, is that an annotated Hoehling?

A Yes.

Mooney continued with similar responses regarding pages 5-41 and further continued Page 303:

Q 42.

A This is a digest from Hoehling. 42 is definitely a digest from Hoehling. But on 43 I am quoting something from Hoehling and Hoehling says, "No motive." I don't know whether that is from Hoehling, or what, so -- let's say for 43 it looks like a digest from Hoehling with notes.

4/ See similarity, infra pp. 20, 21.

Affidavits of experts submitted to the court support the similarity and copying of the elements of Hoehling's book. George Douglas, English professor at the University of Illinois and nephew of Edward Douglas, who died in the Hindenburg crash, stated in his affidavit (J.A. 375, 376):

> 5. That it is my opinion from a literary point of view that the Mooney book The Hindenburg is substantially similar to the Hoehling book Who Destroyed The Hindenburg? and that Hoehling's literary treatment of the last flight of the Hindenburg and the circumstances surrounding the accident in Who Destroyed The Hindenburg? was copied in Mooney's The Hindenburg.
>
> 8. That I am not a lawyer and I do not intend to apply either the facts I outlined above or my opinion to the copyright laws. However, it is my opinion that in the academic profession, the Mooney book would be immediately seen as a clear-cut theft and plagiarism.

C. Universal's Motion Picture, The Hindenburg.

In December 1975 defendant Universal released its motion picture The Hindenburg. As the case against Universal depended primarily on the case against Mooney, no separate discussion of the motion picture will be set forth. The importance of the Hoehling book as copied by Mooney was

succinctly set forth in Universal's publicity materials:

> "The subject had intrigued moviemakers for years, but it was seen as a project that defied filmization.
>
> With the publication of "The Hindenburg" by Michael M. Mooney (Dodd, Mead), there was available a body of fresh material on which a suspenseful motion picture - not a documentary - could be based. Robert Wise, the Filmakers Group and Universal moved in quickly to retell in cinematic terms the story of the airship's final voyage from Frankfurt to Lakehurst. Mooney's (i.e. Hoehling's) account of sabotage by a crew member was only one of a number of sabotage theories advanced since the explosion, but it lent itself with dramatic force and impact to the screen."

D. An Examination Of Certain Similarities:

The Plaintiff in the Court below set forth a comparison of 265 selections of Hoehling's book and Mooney's book and included with those comparative sections, Mooney's notes and outlines which were acknowledged to be from the Hoehling book. These examples were related to major elements of the Hoehling book, including: (a) the Spehl (Karl Boerth) story, (b) the Hilda Schmidt (Beatrice Friedrich, Freda Halle) story, (c) the Kathie Rauch story, (d) the destruction of the Hindenburg with a small bomb including flashlight

batteries and a small timing device, (e) the placement of the bomb in a slit in the drooping folds of Gas Cell IV, (f) The Major Hufschmidt story, (g) the story of Detectives Johnson and Ballenstadt, (h) the Heldenkeller story, (i) the story of the anti Nazi plot. Most importantly, the overall dramatic composition of the Mooney book, juxtaposing all of the individual elements of the Hoehling story, was the same as Hoehling's story in Who Destroyed the Hindenburg?

Specific similarities referred to included the description and placement of Hoehling's bomb.:

Hoehling Page 189:

> "To Sauter's engineering mind the conclusion was irrefutable: there had to be a Hollenmaschine, an incendiary device, in that very position. It was a snug place of concealment: beneath the shelter of the walk and tucked against the fabric, which would become more limp and creased with folds at the end of a voyage. While, Sauter asserted, the gas shafts were inspected every four hours, there was no way of poking around the folds without danger of seriously damaging the cell material, possibly even igniting the hydrogen."

Mooney, page 216:

> "When the time was right, he would cut into the folds of the gas cell with a knife. From

> the ladder leading up to the middle walkway he could reach over into the uninflated drooping part of the cell."

One dramatic similarity between the Hoehling book and the Mooney book shows how Mooney attempted to disguise his copying by changing Hoehling's "was gibt" which appears in Mooney's draft manuscript (J.A. 499), to "what's wrong" as it appears in his book. See Mooney's testimony p.16 supra.

Hoehling, page 201-202:

> "Possibly more confounding to Nunnenmacher were Spehl's nightmares, his 'Alpdrucken.'
>
> 'Er verstecken musst?' asks the steward. What, indeed was the young rigger concealing that pounded at his subconscious at night and caused him to cry out?
>
> When Nunnenmacher hastened to his bunk to shake Spehl and ask, "Was gibt, Eric?" he was greeted with unintelligible, disturbed mutterings before the crew member awoke, startled and somewhat embarrassed.
>
> 'Was gibt . . . ?' What was the matter?"

Mooney, page 205, 206:

> "One of Spehl's bunkmates, Steward Nunnenmacher, stopped by to fetch a clean white jacket. His was stained. He would be busy for another hour yet, fetching brandies and white mints. Nunnenmacher heard Spehl groaning in a nightmare. He would have left the rigger alone except that the intensity of the nightmare was growing: Spehl's agonies

were increasing towards a scream. Nunnenmacher shook him awake:

'What's wrong? What's wrong, Eric?'"

Other examples of similarities include the following:

Hoehling, page 26, 27:

> "Karl Otto Clemens's photographic paraphernalia was the subject of some interest, although the Reederei had booked him at half fare in return for publicity photographs he would make. He had four cameras, of varying size and quality, and several cartons of film. The inspectors finally were convinced he had no flash bulbs or processing chemicals in his equipment. Pocket flashlights were also forbidden items -- as were the small dry cell batteries which powered them."

Mooney, page 136:

> "A young man, whose name turned out to be Carl Otto Clemens, had cameras of all kinds about his neck. The inspectors confiscated from him the flashbulbs he said he needed for indoor shots, but they were relentless. Flashbulbs were not allowed."

Hoehling page 10:

> "The past fall, during the Hindenburg's last flight from South America, a passenger traveling on a Swedish passport had asked questions and also acted in such a way as to arouse suspicion. Notified of this, the Gestapo secretly searched the man's hotel room after arrival in Frankfurt. There they found elaborate interior sketches of the Hindenburg and also of the Graf Zeppelin, with "X" marks against crucial areas: the tops of cells, where the inflation level was always high, fuel lines, and others.

Forewarned, the man never returned to his hotel. The security police searched, but never saw him again."

Mooney page 115, 116:

"Last year, a passenger traveling under a forged Swedish passport, and an assumed name, disappeared before he could be arrested. He landed from the Hindenburg in Frankfurt, took rooms in the Frankfurter Hof. Since he was on the list of suspicious persons, when he absented himself from his room, it was searched. Complete plans and technical drawings of both the Hindenburg and the Graf Zeppelin in great detail were found in his room. Somehow he must have been warned, because he never returned. The Gestapo handled the affair and has been unable subsequently to find the culprit."

Hoehling page 112:

"'No,' Pruss replied matter-of-factly,"

Mooney page 238:

"Pruss answered matter-of factly, 'No'."

Hoehling page 16:

". . . some meters distant from the gangway, then saluted out of courtesy and asked in surprise: 'Captain, where is your luggage?'"

Mooney page 139:

". . . at the head of the gangway. Kubis had saluted and blurted out in surprise: 'Captain, where is your luggage?'"

Hoehling page 17:

"As the two men, captain and steward, walked through the deserted promenade deck towards

> the gondola and Lehmann's own cabin, the latter confided flatly: 'Kubis, I thought my being on board would give my men more assurance--you know.'"

Mooney page 140:

> "As the two men walked toward what would be Lehmann's cabin, the little Captain said:
> 'Kubis, I thought my being on board would give my boys more assurance--you know.'"

Mooney's historical "whodunit" was substantially similar to the historical "whodunit" of A. A. Hoehling. Mooney added two chapters on the history of Zeppelins, changed Hoehling's purposely intended "question mark" ending to a "period," and wrote in a different style; however, the essential elements of Hoehling's story remained. In addition to the essential story line, Mooney's book was similar to Who Destroyed the Hindenburg? in respect to Hoehling's literary phrasing; to conversations created by Hoehling; to Hoehling's juxtaposition of events; to Hoehling's selection of circumstances and marshalling of a case for possible sabotage; Hoehling's translation; and to Hoehling's structuring of the book to suggest sabotage.

REASONS FOR GRANTING THE WRIT

I. This court should set guidelines for copyright infringement actions involving historical literary works.

A. The Court of Appeals for the Second Circuit has adopted legal theories which strip the author of a historical work of all the protections of the copyright statutes.

The Second Circuit Court of Appeals in its decision below has effectively eliminated copyright protection for nonfiction literary works. For the first time a Court sets forth a threshold requirement that, in order to constitute infringement, copying of a nonfiction work must amount to "wholesale usurpation of another's expression." (A-3)[5/] and "a verbatim reproduction of another work" (A-15). According to the Court of Appeals for the Second Circuit, trial courts, in granting summary judgment for a defendant, must merely "assure themselves that the works before them are not virtually identical." (A-15)

5/ A refers to appendix herein.

The requirement of "wholesale usurpation" and "verbatim reproduction" eliminates the time honored requirement that there be only a substantial similarity, i.e. material similarity, between works. See Sheldon v. Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936) [Sheldon I]. The Second Circuit erroneously limits copyright protection to "literal expression," see Sheldon I, supra and eliminates the need for the "fair use doctrine" now codified in the 1976 copyright act, 17 U.S.C. 107, pursuant to which the exclusive rights of a nonfiction writer are balanced against the public's need for information and the proper use of that information by other persons.

The Second Circuit opinion also rejects the views of other courts that literary expression of a historical nature is protected by the copyright act. Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); Miller v. Universal City Studios, 460 F. Supp. 984 (S.D. Fla. 1978, appeal pending in the 5th Circuit).

The issues presented in the present case are nearly identical to those presented in Miller

v. Universal City Studios, Inc., supra presently set for argument in the Fifth Circuit for August 18, 1980. With the increasing production of nonfiction books and the adoption of nonfiction works to motion picture and television documentaries, the issue presented in this case and in Miller v. Universal City Studios, Inc., supra is one of increasing importance. Guidelines must be set forth by this court to define the extent to which literary skill and effort of a nonfiction writer is protected by the copyright statutes against pirating by other authors and by television and motion picture producers.

The court of appeals in the decision below further held that specific elements of Hoehling's work copied by the defendants were not subject to copyright protection because they were merely scenes a Faire, that is "incidents, characters or settings which are as a practical matter indispensible or at least standard, in the treatment of a given topic." (A-14) In adopting this legal theory the court of appeals has converted a factual defense that the work was not copied into

a legal one. No other circuit court has adopted this legal theory.

B. The holding below conflicts with other decisions by unreasonably limiting the definition of literary expression protected by the copyright statutes in a historical work to verbatim copying of the literal form of expression.

Prior to the decision by the circuit court below, other courts repeatedly held that expressions of historical fact, although frequently difficult to distinguish from historical facts themselves, are subject to copyright protection. Holdredge v. Knight Publishing Corp., 214 F.Supp. 921, 923 (S.D. Cal. 1963). Under these decisions, Hoehling's research, as expressed in his book, is subject to copyright protection. Toksvig v. Bruce Publishing Co., supra; Miller v. Universal City Studios, supra; likewise, Hoehling's publication of disparate facts is protected by copyright, Toksvig v. Bruce Publishing Co., supra; 1 Nimmer on Copyright §211 (E); Hoehling's interpretation or fictionalization of factual events is protected by copyright, DeAcosta v. Brown, supra; Huie v. National Broadcasting Company, supra, 184 F.Supp

198 (S.D.N.Y. 1960); Holdredge v. Knight Publishing Co., supra; 1 Nimmer on Copyright §211 (C); Plaintiff's historical interpretation and analysis is protected, as previously decided by the Second Circuit in Wainwright Securities v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977); the plaintiff's selection and arrangement of facts and presentation of the story is protected by copyright, Toksvig v. Bruce Publishing Co., supra.; 1 Nimmer on Copyright §211 (D); the way the petitioner structured his material and marshals his facts is protected, Wainwright Securities v. Wall Street Transcript Corp., supra; and of course Hoehling's literal form of expression is protected, Holdredge v. Knight Publishing Corp., 214 F.Supp 921 (S.D. Cal. 1963); 1 Nimmer Copyright §211 (B).

The Second Circuit Court of Appeals specifically rejected these prior decisions in stating that an original interpretation of a historical event is not copyrightable as a matter of of law, (A-12) and that there cannot be copyright protection for the presentation or selection of facts (A-12).

In DeAcosta v. Brown, supra, the court rejected the defendant's contention that plaintiff was not entitled to copyright protection for the historical subject matter, stating at 146 F.2d at 410:

> "It seems quite clear that the original treatment of the life of an historical character, like such treatment of any material in the public domain, is entitled to protection against appropriation by others." (citations omitted)

In Toksvig v. Bruce Publishing Co., supra, the appellate court sustained a finding by the trial court that the defendant's novel infringed on the copyright of the plaintiff's biography of the life of Hans Christian Andersen. The court held that there was substantial evidence of copying and similarity even though the defendant spent eleven months researching his book, stating at 181 F.2d 666:

> "It will be enough to say that the record discloses infringement as to certain general concepts of Andersen and his life and friends as set forth for the first time in plaintiff's book, and in the copying of 24 specific passages of plaintiff's book. There was substantial evidence to support the findings."

In Miller v. Universal City Studios, Inc., supra, after a jury had returned a verdict for the plaintiff, the trial court rejected defendant's contention that because plaintiff's book related to factual events the plaintiff had no copyright protection. Plaintiff's book was in reportorial style and the "plaintiff's technique consisted of personal research and interviews with participants in the drama" while the defendant used the work for a television movie. Plaintiff Miller's case consisted of strong circumstantial evidence of actual copying, but no direct evidence. The Court stated:

> "To this court it doesn't square with reason or common sense to believe that Gene Miller would have undertaken the research involved in writing of 83 Hours Till Dawn (or cite another more famous example, that Truman Capote would have undertaken the research required to write In Cold Blood) if the author thought that upon completion of the book a movie producer or television network could simply come along and take the profits of the books and his research from him. In the age of television 'docudrama' to hold other than research [6/] is copyrightable is to violate the spirit of the copyright law and to provide to those persons and corporations lacking in requisite diligence and ingenuity a license to steal." 460 F. Supp. at 988 (Footnote added).

6/ As expressed in his book.

This court has never addressed the issue of how to define what "literary expression" is subject to copyright protection. This elementary question must now be answered by this court before the Second Circuit Court of Appeals eliminates all "literary expression" but verbatim copying of the literal form of expression from the protection of the copyright laws.

C. The court of appeals' limitation of an action for copyright infringement of an historical work to "wholesale usurpation" is in conflict with all prior decisions that a plaintiff author can prevail where only a small portion of an infringing work has been copied from the plaintiff's work.

Never before has any court of appeals suggested that plaintiff in a copyright infringement action must establish "wholesale usurpation" or "verbatim copying." Proof of copying and proof of similarity should be inversely related, for where there is proof of actual copying, the proof of similarity is offered to establish wrongful appropriation under the copyright laws rather than to establish by circumstantial evidence that the copyrighted work was copied, See Novelty Textile

Mills v. Joan Fabrics Corp., 558 F.2d 1090, 1092 (2d Cir. 1977). Consequently, the amount of similarity is not related to the liability of the defendant, but is a factor to be taken into consideration in establishing the amount of damages, Sheldon v. Metro Goldwyn Pictures, Corp., 309 U.S. 390 (1940)(Sheldon II); Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir. 1962).

In DeAcosta v. Brown, supra, the plaintiff sought to recover for the infringement of her biography on the life of Clara Barton. The appellate court in affirming a judgment for the plaintiff noted that in quantitative terms only a small portion of the infringing work, involving love interest, was copied from the plaintiff's book. However, the small amount of copying was significant particularly in view of the importance of the love interest in the movie trade. The courts in Sheldon I & II, supra reached similar results.

The attempt of the Court of Appeals to limit the application of the copyright laws to "wholesale usurpation" as well as "verbatim copying" must be rejected at this time by this court. This

Court should reaffirm its indication in Sheldon II, supra that only a small amount of copying is required to constitute a wrongful appropriation under the copyright laws

D. The Court converts a factual defense, that defendants did not copy plaintiff's work because the material was available elsewhere, into a threshold legal defense.

In the courts below, the defendant sought to avoid the obvious and strong evidence of copying and similarity by arguing that summary judgment had to be granted to the defendant because the plaintiff's book deals with historical subject matter. That argument was incorrectly adopted by the Second Circuit Court of Appeals in holding that the plaintiff's original expression in the nature of historical subject matter was not subject to copyright protection, ab initio.

This ruling by the Court of Appeals in originating the theories discussed above misapplies the law regarding historical subject matter. The defendant's showing that the plaintiff's book involved historical subject matter merely created a factual defense. In Sheldon I,

supra, the appellate court was faced with the same questions presented in this case in determining whether a movie infringed on a play written by the plaintiff about the life of a real Scottish girl. The Court stated at 81 F.2d 54 that there were only two questions: "First, whether defendants actually used the play; Second, if so, whether there was a fair use."

In Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d at 433 the Second Circuit Court of Appeals made a similar statement regarding use of the Hercules legend in comic books:

> "We have repeatedly held that irrespective of the sources from which the author of a work may derive the material which he uses, a picture or writing which is his own production cannot be copied. The prior art is only relevant as bearing on the question whether an alleged infringer has copied from the author or has taken his material directly from the prior art. Sheldon v. Metro-Goldwyn Pictures Corporation, 2d Cir., 81 F.2d 49, 53."

Further the statement of the district court in Davis v. E. I. DuPont de Nemours & Co., 240 F. Supp 612, 620 (S.D.N.Y. 1965) is relevant:

> "Defendants have too broadly defined their rights. . . . [O]nce copying is established, it is immaterial that a defendant could have created a similar or identical work using elements fairly at his disposal."

The Court of Appeals below has now too broadly defined the rights of defendants to copy works of a historical nature. The copyright protection afforded to authors for the purpose of stimulating literary creativity must be balanced against the public's right to information. The well developed "fair use" doctrine provides ample opportunity for defendants to establish that they have not improperly copied a plaintiff's original work. See Argument II infra.

E. The court below has converted a factual defense that a scene a faire was not copied from the plaintiff to an absolute legal bar to recovery even though copying has been established.

The court below argued that the individual similarities between the Hoehling and Mooney books could not be the basis for a copyright infringement action because they are "scenes a faire, that is, incidents, characters or settings which are as a practical matter indispensible, or at least standard, in the treatment of a given

topic" (A-14), c.f. Alexander v. Haley, 460 F.Supp 40, 45 (S.D.N.Y. 1978). 7/ Once again the Courts

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7/ One such alleged scene a faire is as follows:

From Hoehling p. 56:

"The Department of State, possibly informed in turn by Army and Navy intelligence officers, had advised the New York police that there might be an attempt this voyage by the German Intelligence Corps to land one or more 'espionage agents' in America. These operatives could be either crewmen or passengers. The presence and true identity, for example, of Oberst Erdmann, Major Witt and Lieutenant Hinkelbein had been communicated to Washington the minute they arrived in the Frankfurter Hof, even though they were booked merely as civilian passengers."

And Hoehling p. 73:

"Still ringing in Detective Johnson's ears were instructions from his superior, Captain Thomas Duggan, head of the alien squad: 'Don't let any of those Goddamn Nazis sneak in!' Arthur Johnson felt amply confident that none could go past his eagle scrutiny."

To Mooney p. 132:

"Naval Intelligence altered State that three fairly important Luftwaffe officers were traveling in mufti as passengers, due to arrive on the Hindenburg Thursday at 6 A.M. In turn, State had contacted New York Police. his captain had assigned Johnson with instructions: 'Don't let any of those gaddam Nazis slip into the country.' Johnson entered "Thursday--Lakehurst" into his appointment book."

below converts a factual defense -- that the similarity arose by coincidence and not because the defendant copied the plaintiff's work -- into a legal one. According to the court below the fact that plaintiff Hoehling may have established that passages in Mooney's book were copied from Hoehling's book is immaterial.

The second circuit in Bradbury v. Columbia Broadcasting System, Inc., 287 F.2d 478 (9th Cir. 1961) rejected a claim of coincidence on far less proof of copying and less detailed analyses of similarities between works then is present in this case. The court emphasized that the similarities found in that case could not be coincidence and that authors must receive protection for dramatic treatment of their works. The court quoted from Dam v. Kirk La Shelle Company, 175 Fed. 902, 907 (2d Cir. 1910):

> "It is impossible to make a play out of a story -- to represent a narrative by dialogue and action -- without making changes, and a playwright who appropriates the theme of another's story cannot, in our opinion, escape the charge of infringement by adding to or slightly varying his incidents.
>
> It is undoubtedly true, as claimed by the defendant, that an author cannot by a

> suggestion obtain exclusive control of a field of thought upon a particular subject. If the playwright in this case without the use of the story, and working independently, had constructed a play embracing its central idea, it may well be that he would not have infringed the copyright of the story. But a comparison of the play with the story shows conclusively in many unimportant details that Armstrong read the story and used it as the basis of his play. It is practically impossible that the similarities were coincidences. Other testimony is to the same effect. In our opinion the playwright deliberately appropriated the story and dramatized it." 287 F.2d. at 484, 485

The extensive digesting, annotating and other copying of Who Destroyed The Hindenburg? by Mooney led to the detailed similarities between the Hoehling book and the Mooney book.

The Second Circuit's statement in Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d at 433 is also relevant:

> ...the pictorial representations and verbal descriptions of "Superman" are not a mere delineation of a benevolent Hercules, but embody an arrangement of incidents and literary expressions original with the author..."

The second circuit has taken another legitimate factual defense discussed in Bradbury and Dam and turned it into an illegitimate legal barrier to recovery under the copyright laws. The

use of the scene a faire defense was initially adopted by the second circuit to rebut an inference of copying which would arise from proof of access and substantial similarity. See Reyher v. Children's Television Workshop, 533 F.2d 87 (2d Cir. 1976). Now the second circuit pyramids the defense to ignore proof of actual copying. This court should not allow the second circuit to rule on legitimate factual issues as a matter of law.

II. This court should reassert that the "fair use" doctrine is the only appropriate method for balancing the exclusive rights of a historical author with the public's right to information and reject the Second Circuit's threshold test established by the court below.

Plaintiff's book, Who Destroyed the Hindenburg? deals with historical subject matter and, in proper factual circumstances, the copying of the plaintiff's literary work might be subject to the defense of fair use. The Second Circuit however, rejects the application of the fair use doctrine in favor of a threshold test requiring wholesale usurpation and verbatim copying of historical subject matter. In ignoring and refusing to apply the fair use doctrine the Second

Circuit rejects years of development of that test for balancing the author's exclusive right under the copyright laws to protect his original work with the rights of the public to have full and complete access to the author's information. See Orgel v. Clark Boardman Co., 301 F.2d 119 2nd Cir. 1962 Cert. denied 371 U.S. 817; Wainwright Securities v. Wall Street Transcript Corp., supra; Rosemont Enterprises v. Random House, 366 F.2d 313 (2d Cir. 1966); Marvin Worth Productions v. Superior Films Corp., 391 F. Supp. 1269 (S.D.N.Y. 1970).

The exclusive right of the plaintiff-petitioner Hoehling to his work and the defendant's right to use the information and creative literary work of A. A. Hoehling may be analyzed by answering the questions set forth at 17 U.S.C. §107 which codifies the judicial concept of fair use:

> 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> 2. The nature of the copyrighted work;
> 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. The effect of the use upon the potential market for or value of the copyrighted work.

Because the work of the plaintiff-petitioner was appropriated for a competing work and for the sale of the derivative motion picture rights to the work, it seems unlikely that the balancing factors would be resolved in favor of the defendants at the trial of this case. However that question is a factual matter which need not be decided by the appellate court or by this Court. What is important is that this Court lend its weight to the application of the fair use doctrine which has developed over the years and has now been ratified by Congress. The fair use doctrine cannot be replaced by a threshold determination of "wholesale usurpation" and "verbatim copying."

III. If the historical work of plaintiff is denied any copyright protection then this court should consider whether a common law action for misappropriation of such work under the Court's decision in International New Service v. Associated Press is preempted by the copyright statutes.

The court of appeals' determination that the historical work of plaintiff-petitioner Hoehl-

ing falls outside the protection of the copyright laws raises a further issue which must be addressed by this court, regarding the application of the unfair competition principles of International News Service v. Associated Press, 248 U.S. 215 (1918) giving the plaintiff an action against the defendants for misappropriation of the plaintiff's skill and effort. The Second Circuit ruled that such action under International News Service was preempted under the Federal Copyright Act, citing Sears Roebuck and Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day Brite Lighting, Inc., 376 U.S. 234 (1964). However, this court in Goldstein v. California, 412 U.S. 546 (1973) limited the application of the Sears and Compco cases, holding that the states had the right to regulate protection of areas deemed outside the protection of the copyright act. The congress in the 1976 amendments to the copyright act also rejected a broad reading of the Sears and Compco doctrine as it applied to the unfair competition action under International News Service v. Associated Press, supra, 17 U.S.C. §301, H.R.

94-1476, S.R. 94-473. The House Report states at page 132, H.R. 94-1476, 1976 U.S. Code Cong. & Ad. News, 5748:

> "'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as 'misappropriation' is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news, whether in the traditional mold of International News Service v. Associated Press, 248 U.S. 215 (1918), or in the newer form of data updates from scientific, business or financial data bases." (footnotes omitted)

By holding that the expression of the plaintiff-petitioner's research is not protected by the copyright statute rather than ruling that the use of the expression of the research must be made subject to the fair use doctrine, the court has, in effect, concluded that the common law action for misappropriation is based on a right that is not within the general scope of the copyright act. And that action is not preempted by the federal copyright statute. The House report

states on page 331, 1976, U.S. Code Congressional Administrative News, 5747:

> "In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 and Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute." (footnotes omitted)

Section 301 and its legislative history, make clear that there is no unprotected middle ground which allows the theft of an author's enterprise, organization, skill and labor by competitors. This court should clarify the application of the preemption to the unfair competition suit under International News Service v. Associated Press, supra. See A&M Records, Inc. v. M. V. C. Distributing Corp., 574 F.2d 312 (6th Cir. 1978); See also Jacobs v. Robitaille, 406 F. Supp. 1145 (D.N.H. 1976); Truck Equipment Service Co. v. Fruehauf Corp., 536 F.2d 1210 (8th Cir. 1976).

IV. The extensive factual findings by the trail court and the court of appeals conflict with standards for determination of a motion for summary judgment set forth in the Federal Rules of Civil Procedure and the decisions of this court.

The Second Circuit Court of Appeals below, in addition to establishing new legal defenses to a claim of copyright infringement, has established new standards for the grant of summary judgment in copyright actions. These standards are inconsistent with the general standards previously enunciated by this court (A-9, A-10). This court in Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); United States v. Diebold, 369 U.S. 654, 655, (1962), repeated the general rule that all inferences to be drawn from underlying facts in affidavits must be viewed in the light most favorable to the party opposing the motion. In this case such inferences must be drawn in favor of the plaintiff-petitioner, A. A. Hoehling. See also Blumcraft of Pittsburg v. Newman Brothers, 373 F.2d 905 (6th Cir. 1967); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

Not only did the court of appeals not draw inferences in favor of the plaintiff, but made extensive findings of fact in its decision. For example, the court states that the book of Dale M. Titler, Wings of Mystery, was published in 1962, and inferred that the story of the destruction of the Hindenburg contained in Titler's book was independently written by Titler. In fact, the uncontradicted affidavits filed with the trial court showed that the Titler. by his own admission, copied the original story of Hoehling in that book.

The central issues directed to the trial court were the extent of copying and the fair use of the plaintiff's historical work by the defendants, Mooney and Universal. By setting forth new standards for the grant of a motion for summary judgment and by drawing inferences against Hoehling, the Second Circuit Court of Appeals has violated the standards set forth in Rule 56, F.R. Civ. P. and set forth by this court.

CONCLUSION

For all the foregoing reasons, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Dated: June 24, 1980

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 692—September Term, 1979

(Argued February 27, 1980 Decided March 25, 1980)

Docket No. 79-7704

A. A. HOEHLING,

Plaintiff-Appellant,

—v.—

UNIVERSAL CITY STUDIOS, INC.,

and

MICHAEL MAC DONALD MOONEY,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
TIMBERS, *Circuit Judge,*
and WERKER, *District Judge.* *

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a summary judgment entered in the United States District Court for the Southern District of New York, Charles M. Metzner, *District Judge,* dismissing appellant's claims of copyright infringement and unfair competition.

Affirmed.

JAMES C. EASTMAN, ESQ., Washington, D.C. *for Plaintiff-Appellant.*

COUDERT BROTHERS, New York, New York (Eugene L. Girden, Esq., of counsel), *for Defendant-Appellee Universal City Studios, Inc.*

PETER FLYNN, ESQ., Chicago, Illinois, and MYRON M. CHERRY, ESQ., Chicago, Illinois (Cherry, Flynn & Kanter) and James J. McEnroe, Esq., New York, New York (Watson, Leavenworth, Kelton & Taggert), *for Defendant-Appellee Michael M. Mooney.*

KAUFMAN, *Chief Judge*:

A grant of copyright in a published work secures for its author a limited monopoly over the expression it contains. The copyright provides a financial incentive to those who would add to the corpus of existing knowledge by creating original works. Nevertheless, the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis. The rationale for this doctrine is that

the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author's original expression of particular facts and theories already in the public domain. As the case before us illustrates, absent wholesale usurpation of another's expression, claims of copyright infringement where works of history are at issue are rarely successful.

I.

This litigation arises from three separate accounts of the triumphant introduction, last voyage, and tragic destruction of the Hindenburg, the colossal dirigible constructed in Germany during Hitler's reign. The zeppelin, the last and most sophisticated in a fleet of luxury airships, which punctually floated its wealthy passengers from the Third Reich to the United States, exploded into flames and disintegrated in 35 seconds as it hovered above the Lakehurst, New Jersey Naval Air Station at 7:25 p.m. on May 6, 1937. Thirty-six passengers and crew were killed but, fortunately, 52 persons survived. Official investigations conducted by both American and German authorities could ascertain no definitive cause of the disaster, but both suggested the plausibility of static electricity or St. Elmo's Fire, which could have ignited the highly explosive hydrogen that filled the airship. Throughout, the investigators refused to rule out the possibility of sabotage.

The destruction of the Hindenburg marked the concluding chapter in the chronicle of airship passenger

service, for after the tragedy at Lakehurst, the Nazi regime permanently grounded the Graf Zeppelin I and discontinued its plan to construct an even larger dirigible, the Graf Zeppelin II.

The final pages of the airship's story marked the beginning of a series of journalistic, historical, and literary accounts devoted to the Hindenburg and its fate. Indeed, weeks of testimony by a plethora of witnesses before the official investigative panels provided fertile source material for would-be authors. Moreover, both the American and German Commissions issued official reports, detailing all that was then known of the tragedy. A number of newspaper and magazine articles had been written about the Hindenburg in 1936, its first year of trans-Atlantic service, and they, of course, multiplied many fold after the crash. In addition, two passengers—Margaret Mather and Gertrud Adelt—published separate and detailed accounts of the voyage. C.E. Rosendahl, commander of the Lakehurst Naval Air Station and a pioneer in airship travel himself, wrote a book titled *What About the Airship*?, in which he endorsed the theory that the Hindenburg was the victim of sabotage. In 1957, Nelson Gidding, who would return to the subject of the Hindenburg some 20 years later, wrote an unpublished "treatment" for a motion picture based on the deliberate destruction of the airship. In that year as well, John Toland published *Ships in the Sky* which, in its seventeenth chapter, chronicled the last flight of the Hindenburg. In 1962, Dale Titler released *Wings of Mystery*, in which he too devoted a chapter to the Hindenburg.[1]

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1 Titler's account was published after the release of appellant's book. In an affidavit in this litigation, Titler states that he copied

Appellant A.A. Hoehling published *Who Destroyed the Hindenburg*?, a full-length book based on his exhaustive research in 1962. Mr. Hoehling studied the investigative reports, consulted previously published articles and books, and conducted interviews with survivors of the crash as well as others who possessed information about the Hindenburg. His book is presented as a factual account, written in an objective, reportorial style.

The first half recounts the final crossing of the Hindenburg, from Sunday, May 2, when it left Frankfurt, to Thursday, May 6, when it exploded at Lakehurst. Hoehling describes the airship, its role as an instrument of propaganda in Nazi Germany, its passengers and crew, the danger of hydrogen, and the ominous threats received by German officials, warning that the Hindenburg would be destroyed. The second portion, headed *The Quest*, sets forth the progress of the official investigations, followed by an account of Hoehling's own research. In the final chapter, spanning eleven pages, Hoehling suggests that all proffered explanations of the explosion, save deliberate destruction, are unconvincing. He concludes that the most likely saboteur is one Eric Spehl, a "rigger" on the Hindenburg crew who was killed at Lakehurst.

According to Hoehling, Spehl had motive, expertise, and opportunity to plant an explosive device, constructed of dry-cell batteries and a flashbulb, in "Gas Cell 4," the location of the initial explosion. An amateur photographer with access to flashbulbs, Spehl could have destroyed the Hindenburg to please his

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Hoehling's theory of sabotage. Hoehling, however, has never instituted a copyright action against Titler.

ladyfriend, a suspected communist dedicated to exploding the myth of Nazi invincibility.

Ten years later appellee Michael MacDonald Mooney published his book, *The Hindenburg*. Mooney's endeavor might be characterized as more literary than historical in its attempt to weave a number of symbolic themes through the actual events surrounding the tragedy. His dominant theme contrasts the natural beauty of the month of May, when the disaster occurred, with the cold, deliberate progress of "technology." The May theme is expressed not simply by the season, but also by the character of Spehl, portrayed as a sensitive artisan with needle and thread. The Hindenburg, in contrast, is the symbol of technology, as are its German creators and the Reich itself. The destruction is depicted as the ultimate triumph of nature over technology, as Spehl plants the bonb that ignites the hydrogen. Developing this theme from the outset, Mooney begins with an extended review of man's efforts to defy nature through flight, focusing on the evolution of the zeppelin. This story culminates in the construction of the Hindenburg, and the Nazis' claims of its indestructibility. Mooney then traces the fateful voyage, advising the reader almost immediately of Spehl's scheme. The book concludes with the airship's explosion.

Mooney acknowledges, in this case, that he consulted Hoehling's book, and that he relied on it for some details. He asserts that he first discovered the "Spehl-as-saboteur" theory when he read Titler's *Wings of Mystery*. Indeed, Titler concludes that Spehl was the saboteur, for essentially the reasons stated by Hoehling. Mooney also claims to have studies the complete National Archives and New York Times files concern-

ing the Hindenburg, as well as all previously published material. Moreover, he traveled to Germany, visited Spehl's birthplace, and conducted a number of interviews with survivors.

After Mooney prepared an outline of his anticipated book, his publisher succeeded in negotiations to sell the motion picture rights to appellee Universal City Studios.[2] Universal then commissioned a screen story by writers Levinson and Link, best known for their television series, *Columbo*, in which a somewhat disheveled, but wise detective unravels artfully conceived murder mysteries. In their screen story, Levinson and Link created a Columbo-like character who endeavored to identify the saboteur on board the Hindenburg. Director Robert Wise, however, was not satisfied with this version, and called upon Nelson Gidding to write a final screenplay. Gidding, it will be recalled, had engaged in preliminary work on a film about the Hindenburg almost twenty years earlier.

The Gidding screenplay follows what is known in the motion picture industry as a "Grand Hotel" formula, developing a number of fictional characters and subplots involving them. This formula has become standard fare in so-called "disaster" movies, which have enjoyed a certain popularity in recent years. In the film, which was released in late 1975, a rigger named "Boerth," who has an anti-Nazi ladyfriend, plans to

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2 Mooney, his publishers, and Universal entered into an agreement under which (1) Universal acquired the film rights to Mooney's book, (2) Universal agreed to promote sales of the book, and (3) Mooney would receive a percentage fee, tied to sales of his book. Hoehling claims that because of this arrangement, Universal is vicariously liable if Mooney's book, but not the motion picture, is held to infringe his copyright. In view of our disposition of the appeal, however, we need not address this issue.

destroy the airship in an effort to embarrass the Reich. Nazi officials, vaguely aware of sabotage threats, station a Luftwaffe intelligence officer on the zeppelin, loosely resembling a Colonel Erdmann who was aboard the Hindenburg. This character is portrayed as a likable fellow who soon discovers that Boerth is the saboteur. Boerth, however, convinces him that the Hindenburg should be destroyed and the two join forces, planning the explosion for several hours after the landing at Lakehurst, when no people would be on board. In Gidding's version, the airship is delayed by a storm, frantic efforts to defuse the bomb fail, and the Hindenburg is destroyed. The film's subplots involve other possible suspects, including a fictional countess who has had her estate expropriated by the Reich, two fictional confidence men wanted by New York City police, and an advertising executive rushing to close a business deal in America.

Upon learning of Universal's plans to release the film, Hoehling instituted this action against Universal for copyright infringement and common law unfair competition in the district court for the District of Columbia in October 1975. Judge Smith declined to issue an order restraining release of the film in December, and it was distributed throughout the nation.

In January 1976, Hoehling sought to amend his complaint to include Mooney as a defendant. The district court, however, decided that it lacked personal jurisdiction over Mooney.[3] In June 1976, Hoehling again attempted to amend his complaint, this time to add Mooney's publishers as defendants. Judge Smith

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3 At the same time, Judge Smith denied Universal's motion for summary judgment, concluding it was inappropriate prior to the completion of requested discovery.

denied this motion as well, but granted Hoehling's request to transfer the litigation to the Southern District of New York, 28 U.S.C. § 1404(a), where Mooney himself was successfully included as a party. Judge Metzner, with the assistance of Magistrate Sinclair, supervised extensive discovery through most of 1978. After the completion of discovery, both Mooney and Universal moved for summary judgment, Fed. R. Civ. P. 56, which was granted on August 1, 1979.

II.

It is undisputed that Hoehling has a valid copyright in his book. To prove infringement, however, he must demonstrate that defendants "copied" his work and that they "improperly appropriated" his "expression." *See Arnstein* v. *Porter*, 154 F.2d 464, 468 (2d Cir. 1946). Ordinarily, wrongful appropriation is shown by proving a "substantial similarity" of *copyrightable* expression. *See Nichols* v. *Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). Because substantial similarity is customarily an extremely close question of fact, *see Arnstein*, *supra*, 154 F.2d at 468, summary judgment has traditionally been frowned upon in copyright litigation, *id.* at 474. Nevertheless, while *Arnstein*'s influence in other areas of the law has been diminished, *see SEC* v. *Research Automation Corp.*, 585 F.2d 31 (2d Cir. 1978); 6 *Moore's Federal Practice* ¶ 56.17[14] (2d ed. 1976), a series of copyright cases in the Southern District of New York have granted defendants summary judgment when all alleged similarity related to *non*-copyrightable elements of the plaintiff's work, *see, e.g.*, *Alexander* v. *Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978);

Musto v. *Meyer*, 434 F. Supp. 32 (S.D.N.Y. 1977); *Gardner* v. *Nizer*, 391 F. Supp. 940 (S.D.N.Y. 1975); *Fuld* v. *National Broadcasting Co.*, 390 F. Supp. 877 (S.D.N.Y. 1975). These cases signal an important development in the law of copyright, permitting courts to put "a swift end to meritless litigation" and to avoid lengthy and costly trials. *Quinn* v. *Syracuse Model Neighborhood Corp.*, No. 79-7561, slip op. at 835 (2d Cir. Jan. 8, 1980); *accord*, *Donnelly* v. *Guion*, 467 F.2d 290, 293 (2d Cir. 1972); *American Manufacturers Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.*, 388 F.2d 272, 278 (2d Cir. 1967). Drawing on these cases, Judge Metzner assumed both copying and substantial similarity, but concluded that all similarities pertained to various categories of non-copyrightable material. Accordingly, he granted appellees' motion for summary judgment. We affirm the judgment of the district court.

A

Hoehling's principal claim is that both Mooney and Universal copied the essential plot of his book—*i.e.*, Eric Spehl, influenced by his girlfriend, sabotaged the Hindenburg by placing a crude bomb in Gas Cell 4. In their briefs, and at oral argument, appellees have labored to convince us that their plots are not substantially similar to Hoehling's. While Hoehling's Spehl destroys the airship to please his communist girlfriend, Mooney's character is motivated by an aversion to the technological age. Universal's Boerth, on the other hand, is a fervent anti-fascist who enlists the support of a Luftwaffe colonel who, in turn, unsuccessfully attempts to defuse the bomb at the eleventh hour.

Although this argument has potential merit when presented to a fact finder adjudicating the issue of substantial similarity, it is largely irrelevant to a motion for summary judgment where the issue of substantial similarity has been eliminated by the judge's affirmative assumption. Under Rule 56(c), summary judgment is appropriate only when "there is no genuine issue as to any material fact." *Accord*, *Heyman* v. *Commerce & Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975). Perhaps recognizing this, appellees further argue that Hoehling's plot is an "idea," and ideas are not copyrightable as a matter of law. *See Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

Hoehling, however, correctly rejoins that while ideas themselves are not subject to copyright, his "expression" of *his* idea is copyrightable. *Id.* at 54. He relies on Learned Hand's opinion in *Sheldon*, *supra*, at 50, holding that *Letty Lynton* infringed *Dishonored Lady* by copying its story of a woman who poisons her lover, and Augustus Hand's analysis in *Detective Comics, Inc.* v. *Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940), concluding that the exploits of "Wonderman" infringed the copyright held by the creators of "Superman," the original indestructible man. Moreover, Hoehling asserts that, in both these cases, the line between "ideas" and "expression" is drawn, in the first instance, by the fact finder.

Sheldon and *Detective Comics*, however, dealt with works of fiction,[4] where the distinction between an

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4 In *Sheldon*, both works were loosely based on an actual murder committed by a young Scottish girl. Judge Hand, however, clearly dealt only with the fictional plots conceived by the respective authors. *See Sheldon* v. *Metro Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

idea and its expression is especially elusive. But, where, as here, the idea at issue is an interpretation of an historical event, our cases hold that such interpretations are not copyrightable as a matter of law. In *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), we held that the defendant's biography of Howard Hughes did not infringe an earlier biography of the reclusive alleged billionaire. Although the plots of the two works were necessarily similar, there could be no infringement because of the "public benefit in encouraging the development of historical and biographical works and their public distribution." *Id.* at 307; *accord*, *Oxford Book Co.* v.*College Entrance Book Co.*, 98 F.2d 688 (2d Cir. 1938). To avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots. Learned Hand counseled in *Myers* v. *Mail & Express Co.*, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919), "[t]here cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection."[5]

In the instant case, the hypothesis that Eric Spehl destroyed the Hindenburg is based entirely on the interpretation of historical facts, including Spehl's life,

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5 This circuit has permitted extensive reliance on prior works of history. *See, e.g., Gardner* v. *Nizer*, 391 F. Supp. 940 (S.D.N.Y. 1975) (the story of the Rosenberg trial not copyrightable); *Fuld* v. *National Broadcasting Co.*, 390 F. Supp. 877 (S.D.N.Y. 1975) ("Bugsy" Siegel's life story not copyrightable); *Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957) (the life of Anna Carroll, a member of Lincoln's cabinet, not copyrightable). The commentators are in accord with this view. *See, e.g.*, 1 *Nimmer on Copyright* § 2.11[A] (1979); Chafee, *Reflections on the Law of Copyright: I*, 45 Colum. L. Rev. 503, 511 (1945).

his girlfriend's anti-Nazi connections, the explosion's origin in Gas Cell 4, Spehl's duty station, discovery of a dry-cell battery among the wreckage, and rumors about Spehl's involvement dating from a 1938 Gestapo investigation. Such an historical interpretation, whether or not it originated with Mr. Hoehling, is not protected by his copyright and can be freely used by subsequent authors.

B

The same reasoning governs Hoehling's claim that a number of specific facts, ascertained through his personal research, were copied by appellees.[6] The cases in this circuit, however, make clear that factual information is in the public domain. *See, e.g., Rosemont Enterprises, Inc., supra*, 366 F.2d at 309; *Oxford Book Co., supra*, 98 F.2d at 691. Each appellee had the right to "avail himself of the facts contained" in Hoehling's book and to "use such information, whether correct or incorrect, in his own literary work." *Greenbie* v. *Noble*,

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6 In detailed comparisons of his book with Mooney's work and Universal's motion picture, Hoehling isolates 266 and 75 alleged instances of copying, respectively. Judge Metzner correctly pointed out that many of these allegations are patently frivolous. The vast majority of the remainder deals with alleged copying of historical facts. It would serve no purpose to review Hoehling's specific allegations in detail in this opinion. The following ten examples, however, are illustrative: (1) Eric Spehl's age and birthplace; (2) Crew members had smuggled monkeys on board the Graf Zeppelin; (3) Germany's ambassador to the United States dismissed threats of sabotage; (4) A warning letter had been received from a Mrs. Rauch; (5) The Hindenburg's captain was constructing a new home in Zeppelinheim; (6) Eric Spehl was a photographer; (7) The airship flew over Boston; (8) The Hindenburg was "tail heavy" before landing; (9) A member of the ground crew had etched his name in the zeppelin's hull; and (10) The navigator set the Hindenburg's course by reference to various North Atlantic islands.

151 F. Supp. 45, 67 (S.D.N.Y. 1957). Accordingly, there is little consolation in relying on cases in other circuits holding that the fruits of original research are copyrightable. *See, e.g., Toksvig* v. *Bruce Publications Corp.*, 181 F.2d 664, 667 (7th Cir. 1950); *Miller* v. *Universal City Studios, Inc.*, 460 F. Supp. 984 (S.D. Fla. 1978). Indeed, this circuit has clearly repudiated *Toksvig* and its progeny. In *Rosemont Enterprises, Inc., supra*, 366 F.2d at 310, we refused to "subscribe to the view that an author is absolutely precluded from saving time and effort by referrilng to and relying upon prior published material . . . . It is just such wasted effort that the proscription against the copyright of ideas and facts . . . . are designed to prevent." *Accord*, 1 *Nimmer on Copyright* § 2.11 (1979).

C

The remainder of Hoehling's claimed similarities relate to random duplications of phrases and sequences of events. For example, all three works contain a scene in a German beer hall, in which the airship's crew engages in revelry prior to the voyage. Other claimed similarities concern common German greetings of the period, such as "Heil Hitler," or songs, such as the German national anthem. These elements, however, are merely *scenes a faire*, that is, "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." *Alexander, supra*, 460 F. Supp. at 45; *accord, Bevan* v. *Columbia Broadcasting System, Inc.*, 329 F. Supp. 601, 607 (S.D.N.Y. 1971). Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain "stock" or standard

literary devices, we have held that *scenes a faire* are not copyrightable as a matter of law. *See Reyher* v. *Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976).

D

All of Hoehling's allegations of copying, therefore, encompass material that is non-copyrightable as a matter of law, rendering summary judgment entirely appropriate. We are aware, however, that in distinguishing between themes, facts, and *scenes a faire* on the one hand, and copyrightable expression on the other, courts may lose sight of the forest for the trees. By factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author's expression. A verbatim reproduction of another work, of course, even in the realm of nonfiction, is actionable as copyright infringement. *See Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), cert. denied, 434 U.S. 1014 (1978). Thus, in granting or reviewing a grant of summary judgment for defendants, courts should assure themselves that the works before them are not virtually identical. In this case, it is clear that all three authors relate the story of the Hindenburg differently.

In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another. *Rosemont Enterprises, Inc.*, *supra*, 366 F.2d at 310. This principle is justified by the fundamental policy undergirding the copyright laws—the encouragement of contributions to recorded knowl-

edge. The "financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself." *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). Knowledge is expanded as well, by granting new authors of historical works a relatively free hand to build upon the work of their predecessors.[7]

III

Finally, we affirm Judge Metzner's rejection of Hoehling's claims based on the common law of "unfair competition." Where, as here, historical facts, themes, and research have been deliberately exempted from the scope of copyright protection to vindicate the overriding goal of encouraging contributions to recorded knowledge, the states are pre-empted from removing such material from the public domain. *See, e.g., Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). "To forbid copying" in this case, "would interfere with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." *Id.* at 237.

The judgment of the district court is affirmed.

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7 We note that publication of Mooney's book and release of the motion picture revived long dormant interest in the Hindenburg. As a result, Hoehling's book, which had been out of print for some time, was actually re-released after the film was featured in theaters across the country.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 4269 (CMM) No. 48929

A.A. HOEHLING, *Plaintiff,*

v.

UNIVERSAL CITY STUDIOS, INC. AND MICHAEL MACDONALD MOONEY, *Defendants.*

Filed August 2, 1979

METZNER, D.J.:

Defendants Michael Mooney and Universal City Studios (Universal) both move for summary judgment pursuant to Fed. R. Civ. P. 56(b).

Plaintiff A. A. Hoehling claims that Mooney's book *The Hindenburg* and Universal's motion picture of the same name based in part on Mooney's book, infringed the copyright on his 1962 book *Who Destroyed the Hindenburg*? Plaintiff also claims that Universal aided and abetted Mooney in his infringement. Finally, plaintiff alleges an alternative remedy of unjust enrichment. In his deposition (p. 1319) plaintiff has said that the facts in his book are accurate.

On May 6, 1937, the German dirigible named the Hindenburg exploded while docking in Lakehurst, New Jersey. An official investigation conducted by the German authorities concluded that while the cause of the crash remained unknown, the most likely explanation was that a leak occurred in one of the large gas bags or cells holding the hydrogen which kept the ship aloft; the leaking hydrogen was then ignited by a spark due to lightning, St. Elmo's fire, or internal static electricity. However, these investigators suggested that sabotage was one of several possible causes of the explosion.

After considerable original research plaintiff wrote his book in which he sought to prove that the occurrence actually

resulted from sabotage. Defendant Mooney adopted the theory of sabotage as true in writing his somewhat fictionalized book, on which he claims to have spent considerable time in original research. Sabotage is assumed in the motion picture, and obviously makes a very attractive plot.

Defendants contend that their works are not similar except as to relation of historical facts, which are not copyrightable, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); *Toksvig* v. *Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950); *Alexander* v. *Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978), and as to the idea of the identity of the saboteur and the nature of the sabotage. Copyright does not protect ideas, theories, or broad outlines. *Rosemont Enterprises* v. *Random House*, 366 F.2d 303 (2d Cir. 1966); *Rokeach* v. *Avco Embassy Pictures*, 197 U.S.P.Q. 155 (S.D.N.Y. 1978); *Musto* v. *Meyer*, 434 F.Supp. 32 (S.D.N.Y. 1977), *aff'd*, 598 F.2d 609 (2d Cir. 1979).

Plaintiff responds that expressions of historical fact, as opposed to historical facts themselves, are subject to copyright protection. *Toksvig, supra; Sheldon, supra.* Judge Learned Hand noted in *Sheldon* at 54:

> ". . .defendants were entitled to use, not only all that had gone before, but even the plaintiffs' contribution itself, if they drew from it only the more general patterns; that is if they kept clear of its 'expression.' "

We must therefore look at the books and the motion picture to ascertain whether defendants have kept within the bounds of permissible use of plaintiff's work.

Plaintiff's book is in two parts, the first describing in detail the last voyage of the Hindenburg with some background historical material. The second reviews the official investigations of the disaster and relates the author's personal investigation. The facts are marshalled in the first

part in such a way as to point toward the theory developed in the second part. His theory, in essence, is this:

(1) Fact: The Hindenburg was perceived as a symbol of Nazi accomplishments. Other zeppelins had had threats or sabotage attempts made. On this voyage the German police seemed especially security conscious to several witnesses.

Thus: sabotage was not implausible.

(2) Fact: Zeppelins had flown through electrical storms and St. Elmo's fire without mishap. Tests during the investigation suggested that static sparks could not ignite the hydrogen unless the leak were too large to go unnoticed.

Thus: the official theory was not much more plausible than sabotage.

(3) Fact: A man named Eric Spehl, a rigger on the vessel, had (a) a motive — he had been associating with a woman whose lover had been killed in Spain fighting Franco and may have had anti-Nazi feelings, (b) the means — he had dabled in photography enough to have been able to create a bomb from a flash bulb, a battery and a clock, and (c) access — as a rigger he was one of three individuals who could walk along the central catwalk of the ship in among the hydrogen cells without attracting attention. (This spot would be a convenient one to hide a bomb as the gas cells wrinkle and fold, especially at the end of the voyage, due to loss of gas.)

Thus: there was an individual who, despite the security, might have effected the sabotage.

(4) Some incidental facts support the theory. Two crewmen reported seeing an explosion or flash at the level of the central catwalk near the fourth cell from the stern. Among the wreckage was found a cloth bag containing the chemicals used in a dry cell battery. Eric

Spehl went off duty about an hour and a half before the explosion.

(5) Finally, Hoehling unearthed a letter predicting the disaster which at the time of its receipt seems to have been taken seriously by the German authorities. He relates the story of the letter.

Although the facts just described are the product of plaintiff's lengthy research and marshalling, they and the theory for which they form the base are not copyrightable. If they were, we would not have a plethora of writing about who wrote Shakespeare's plays, or who killed John F. Kennedy. The court disagrees with *Miller* v. *Universal City Studios,* 460 F. Supp. 984 (S.D.Fla. 1978) in so far as it appears to hold that research is copyrightable.

In an effort to establish that defendants have copied his expression and not just the facts and ideas, plaintiff has cited 75 examples of similarity between his book and Universal's movie, and 266 examples of similarity between his book and Mooney's book. The court has examined all of these alleged similarities.

Of the 75 examples of similarities claimed between plaintiff's book and Universal's movie, 23 are in no way similar;[1] ten deal with the theory of sabotage discussed above.[2] All the rest depend on events which are or were represented by Hoehling in his book to be facts except the following:

(24) Hoehling refers to the threat by the French government because it did not want the Hindenburg's " shadow snaking over provincial backyards, hedgerows and chimney pots." In the motion picture an actor says, "The British don't want us over their chimney pots." Scene 75.

(33) Both Hoehling (p.33) and Universal (Scene 241) compare the Hindenburg to the Queen Mary.

(41) Hoehling suggests the presence of the bomb aboard the Hindenburg. (p.54). The movie has three

shots of the ticking clock of the bomb (Scenes 37, 111 and 247).

Any violation based on the above three instances is *de minimis. Gardiner* v. *Nizer,* 391 F. Supp. 940 (S.D.N.Y. 1975). However, the reference to the Queen Mary is used in a different context in the motion picture, and the ticking of a time bomb is a time-honored suspense device.

The claim that the Universal motion picture has infringed plaintiff's book must fail. Universal's motion for summary judgment is granted on that claim.

This, of course, does not dispose of plaintiff's claim that Universal participated in the publicity and sale of Mooney's book which he claims infringes his book. We turn now to the resolution of that claim of infringement.

What has already been said about the 75 alleged similarities in the motion picture applies equally to the 266 alleged similarities in Mooney's book.

For example, the reference to the "cloud of dust" flying from the rope coil is a factual statement from the record of the investigation. The same is true of the reference to the tale of the *Reiter Am Bodensee.* This was Captain Lehmann's thought as expressed by him.

The passengers' excitement in anticipation of landing is still common today in trans-Atlantic flying even after ten flights. *See Alexander* v. *Haley, supra* at 45.

Mooney describes the passage across the English Channel "on the back side of the [storm] front." Hoehling uses the phrase in quotation marks indicating a source, possibly the official record. It is not his expression.

There was a forest fire near the landing site which Hoehling describes as a "persistent fire," laying a "nearly opaque pall of smoke." Mooney describes it as a "pesky fire" and a "black pall of smoke".

Finally, when the Hindenburg was leaving Germany the band played the Horst Wessel Song. I cannot imagine a Nazi

band not playing this song on such an occasion. Both Hoehling and Mooney quote the last four lines of the song in their books. They quite obviously would be used to acquaint the younger readers with the nature and implications of the song.

Clearly, these examples are not violations of the protection of expression.

Mooney's motion for summary judgment is granted. Universal's motion for summary judgment on the issue of aiding and abetting Mooney is likewise granted.

Plaintiff's unjust enrichment claims against both parties cannot be maintained, and summary judgment on these claims is granted to the defendants. *Sears Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp.* v. *Day Brite Lighting, Inc.* 376 U.S. 234 (1964)

So ordered.

/s/ CHARLES M. NUTGUES

United States District Judge

Dated: New York, N.Y.
August 1, 1979

REPEALED TITLE 17
CHAPTER 2—INFRINGEMENT PROCEEDINGS

Sec.
101. Infringement.
(a) Injunction.
(b) Damages and profits; amounts; other remedies.
(c) Impounding during action.
(d) Destruction of infringing copies and plates.
(e) Interchangeable parts for use in mechanical music-producing machines.
[102, 103. Repealed.]
104. Willful infringement for profit.
105. Fraudulent notice of copyright, or removal or alteration of notice.
106. Importation of article bearing false notice or piratical copies of copyrighted work.
107. Importation, during existence of copyright, of piratical copies, or of copies not produced in accordance with section 16 of this title.
108. Forfeiture and destruction of articles prohibited importation.
109. Importation of prohibited articles; regulations; proof of deposit of copies by complainants.
[110, 111. Repealed.]
112. Injunctions; service and enforcement.
113. Transmission of certified copies of papers for enforcement of injunction by other court.
114. Review of orders, judgments, or decrees.
115. Limitations.
(a) Criminal proceedings.
(b) Civil actions.
116. Costs; attorney's fees.

§ 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction

To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies

To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramtic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

(c) Impounding during action

To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

(d) Destruction of infringing copies and plates

To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

(e) Interchangeable parts for use in mechanical music-producing machines

Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice. July 30, 1947, c. 391, 61 Stat. 661; June 25, 1948, c. 646, § 39, 62 Stat. 992; Oct. 15, 1971, Pub.L. 92–140, § 2, 85 Stat. 392.

1976 Act

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec.

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§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified

separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Pub.L. 94–553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2541.

Historical Note

Notes of Committee on the Judiciary, House Report No. 94–1476. The significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant.

Effective Date. Section effective Jan. 1, 1978, except as otherwise expressly provided, see section 102 of Pub.L. 94–553, set out as a note preceding section 101 of this title.

Library References

Copyrights ⇐1 et seq.

C.J.S. Copyright and Literary Property § 1 et seq.

1976 Act

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Pub.L. 94–553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2546.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2546.

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205 (d) and 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2584.

CHAPTER 3—DURATION OF COPYRIGHT

Sec.

301. Preemption with respect to other laws.
302. Duration of copyright: Works created on or after January 1, 1978.
303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978.
304. Duration of copyright: Subsisting copyrights.
305. Duration of copyright: Terminal date.

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2572.

79-2029

Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-2029

A. A. HOEHLING,

Petitioner,

vs.

UNIVERSAL CITY STUDIOS, INC., and MICHAEL MACDONALD MOONEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT UNIVERSAL CITY STUDIOS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1979

No. 79-2029

A. A. HOEHLING,

Petitioner,

vs.

UNIVERSAL CITY STUDIOS, INC., and MICHAEL MACDONALD MOONEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT UNIVERSAL CITY STUDIOS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Second Circuit Court of Appeals correctly rule that ideas, theories, facts and research per se are not copyrightable?

2. Did the Second Circuit Court of Appeals correctly rule that once allegedly infringed elements of petitioner's book were found not to be capable of copyright protection, those elements could not be protected by state law either, *i.e.*, does the doctrine of federal preemption apply?

COUNTERSTATEMENT OF THE CASE

This action was brought pursuant to 17 U.S.C. §1 *et seq.*[1] by petitioner A. A. Hoehling, the author of the book entitled *Who Destroyed the Hindenburg*? Respondent Universal City Studios, Inc. (hereinafter "Universal"), is the motion picture studio which produced the allegedly infringing motion picture entitled "The Hindenburg" (hereinafter the "motion picture" or "film"). Michael MacDonald Mooney (hereinafter "Mooney"), also a respondent, is the author of the book *The Hindenburg* which was purchased by Universal. The United States District Court for the Southern District of New York entered summary judgment in favor of respondents and dismissed the action and the United States Court of Appeals for the Second Circuit, finding many of petitioner's allegations "patently frivolous" (A13),[2] affirmed the judgment of the district court. Petitioner seeks a writ of certiorari to review that judgment.

On December 23, 1975, petitioner applied to the United States District Court, District of Columbia, for a temporary restraining order and preliminary injunction to prevent release of Universal's film. Universal opposed the motion and moved for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. On that same date, Judge Smith denied petitioner's motions and deferred consideration of Universal's motion for summary judgment.

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1. On January 1, 1978 the Copyright Act of 1976, Pub. L. No. 94-553, went into effect. This action was brought under the copyright laws of the United States as they existed prior to January 1, 1978, commonly referred to as the Copyright Act of 1909.

2. References to "A" signify petitioner's appendices.

In an order dated July 15, 1976, Judge Smith denied Universal's motion. Universal then sought leave to take an interlocutory appeal pursuant to 28 U.S.C. §1291(b), but leave was denied.

The case was eventually transferred to Judge Charles M. Metzner of the United States District Court, Southern District of New York. Further discovery was conducted throughout the remainder of 1976, and through parts of the years 1977, 1978 and 1979 by petitioner and respondents.

On October 19, 1978, Universal renewed its motion for summary judgment. Later, in 1979, respondent Mooney also moved for summary judgment.

In an opinion dated August 1, 1979, the district court granted the motions for summary judgment and ordered the petitioner's complaint dismissed. Petitioner appealed to the Second Circuit Court of Appeals which affirmed the district court's dismissal in an opinion dated March 25, 1980.

Both petitioner's book and Universal's motion picture relate the last voyage of the German dirigible Hindenburg and its fiery destruction at Lakehurst, New Jersey, on May 6, 1937. The cause of the explosion that resulted in the airship's destruction has never been finally determined, but the possibility of sabotage has been widely discussed. Petitioner's book entitled *Who Destroyed the Hindenburg?* was published in 1962 and by its own words purports to be a historical "chronicle" of the Hindenburg disaster, including the events leading up to it and subsequent attempts to ascertain its cause. Petitioner's book advances the *theory* that the dirigible Hindenburg was sabotaged by a bomb planted by an actual crew member named Eric Spehl, who died in the crash.

Universal's motion picture entitled "The Hindenburg," first released in 1975, is a fictional drama set in the historical context of the Hindenburg's last voyage. The film shows the Hindenburg as the object of sabotage by an anti-Nazi crew member.

Petitioner contends that his book was infringed by Universal in that the motion picture contained material which was substantially similar to his book, to wit the sabotage of the Hindenburg by an anti-Nazi rigger crewman (SA009-011),[3] who, acting in concert with his mistress who had Communist or leftist connections, destroyed the dirigible by placing a small bomb in hydrogen cell #4 of the Hindenburg (SA029). These are the elements of petitioner's work as they concern the sabotage of the Hindenburg.

The motion picture was filmed from a screenplay written by Nelson Gidding, which was loosely based upon a screenplay story of Richard Levinson and William Link,[4] who in turn used the book *The Hindenburg* by Michael M. Mooney both as a reference work and as a springboard (JA229-230).

As early as 1956 or 1957 (five or six years *before* petitioner wrote his book), Gidding wrote a treatment of the destruction of the Hindenburg entitled "Up-Ship" (JA241-244). ("Up-Ship" is annexed as part of the Supplementary Appendix at page 138.) In that early treatment, the author focused upon the theory of sabotage through the use of a fountain pen bomb secreted on board the Hindenburg during flight, probably in gas cell #4, set to explode after landing and for the purpose of anti-Nazi propaganda. Gidding also used the device of a German army officer stationed on board to foil any attempt at sabotage.

In writing the screenplay for Universal, Gidding did his own extensive research into the Hindenburg's destruction and also expanded upon his treatment in "Up-Ship" using Richard

---

3. References to "SA" and "JA" signify the Supplementary Appendix and Joint Appendix that were submitted to the Second Circuit Court of Appeals.

4. Messrs. Levinson and Link wrote an initial draft of the screenplay for the film, but because of other commitments, they could not continue work on the film (Link deposition at 6-8).

Levinson, William Link and M. M. Mooney's works only as background material (JA241-242).

The Second Circuit Court of Appeals correctly held that petitioner's interpretation of the Hindenburg's destruction, *i.e.*, his theory, was not copyrightable as a matter of law (A12), and also held that respondents were free to avail themselves of the historical facts contained in petitioner's work, whether those facts were correct or incorrect (A13). The court further held that "stock" characters and scenes, *i.e., scenes a faire,* are not copyrightable as a matter of law (A15).

REASONS FOR DENYING THE WRIT

I.

IDEAS AND THEORIES ARE NOT COPYRIGHTABLE.

It is hornbook law that ideas, concepts and theories are not copyrightable. *Baker v. Selden,* 101 U.S. 99 (1879); *Reyher v. Children's Television Workshop,* 533 F. 2d 87 (2d Cir. 1976); *Universal Athletic Sales Co. v. Salkeld,* 511 F. 2d 904 (3d Cir.), *cert. denied,* 423 U.S. 863 (1975); *Rosemont Enterprises, Inc. v. Random House Inc.,* 366 F. 2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967); *Uneeda Doll Co. v. P&M Doll Co.,* 353 F. 2d 788 (2d Cir. 1965); *Eisenschiml v. Fawcett Publications, Inc.,* 246 F. 2d 598 (7th Cir.), *cert denied,* 355 U.S. 907 (1957); *Dellar v. Samuel Goldwyn, Inc.,* 150 F. 2d 612 (2d Cir. 1945), *cert. denied,* 327 U.S. 790 (1946); *Nichols v. Universal Pictures Corp.,* 45 F. 2d 119 (2d Cir.), *cert. denied,* 282 U.S. 902 (1930); *Alexander v. Haley,* 460 F. Supp. 40 (S.D.N.Y. 1978); *Musto v. Meyer,* 434 F. Supp. 32 (S.D.N.Y. 1977), *aff'd without opinion,* 598 F. 2d 609 (2d Cir. 1979); *Fuld v. National Broadcasting Company, Inc.,* 390 F. Supp. 877 (S.D.N.Y. 1975).

Mr. Hoehling nevertheless has admitted throughout this litigation, and indeed even in his petition to this Court (at page

3), that the gravamen of his complaint is that Universal took his "original story", "literary idea and concept", and "story line" (SA025; JA284). Moreover, petitioner has admitted that the language of Universal's motion picture does not follow his book (SA028). Nevertheless petitioner asks this Court to overturn the long-established rule that ideas and theories are not copyrightable. That request should be denied for many reasons.

A. Petitioner's So-Called Original Theory.

Petitioner has described his theory as — a rigger saboteur, woman co-conspirator and placement of a bomb on board the dirigible Hindenburg (Petition at 8; SA027, 029). Universal submits that even had petitioner presented this theory and even were it original with him, it is not capable of copyright protection. Indeed, it is of no import how novel or complex the theory is and it makes utterly no difference whether or not petitioner was the first to devise his theory of how and why the Hindenburg was destroyed. With respect to ideas and theories, novelty or uniqueness *does not* make them copyrightable.

> For example, Picasso may be entitled to a copyright on his portrait of three women painted in the Cubist motif. Any artist, however, may paint a picture of any subject in the Cubist motif, including a portrait of three women, and not violate Picasso's copyright so long as the second artist does not *substantially copy* Picasso's specific expression of his idea.

Dave Grossman Designs, Inc. v. Bortin, 347 F. Supp. 1150, 1156-57 (N.D. Ill., E.D. 1972). (Emphasis in original.)

Indeed as Judge Learned Hand acknowledged in *Nichols v. Universal Pictures Corp., supra,* 45 F. 2d at 121, Einstein's theory of relativity was not amenable to copyright protection

even though it was a unique, complex and valuable idea. *See Musto v. Meyer, supra.* Even if petitioner had been the first to propose the theory, that has no more effect on its copyrightability than the fact that Picasso was the first to paint a portrait of three women in the Cubist motif.

To allow a petitioner to obtain copyright protection of his theory, a mere idea, would contravene the purpose of the copyright clause of the United States Constitution, *viz.*, "[*t*]*o promote* the Progress of Science and the useful arts . . . ." U.S. Con. Art. I, §8, cl. 8. (Emphasis added.) As stated by one court:

> If an author, by originating a new arrangment and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of material to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted.

Becker v. Loew's Inc., 133 F. 2d 889, 891 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943).

After a consideration of well-established law, both the district court (A18) and the Second Circuit (A12, 13) correctly rejected the petitioner's arguments that his idea with respect to the Hindenburg's destruction was copyrightable. Since petitioner's claims clearly are contrary to such established law, the petition should be denied.

B. Petitioner's alleged similarities are all based upon historical facts, purported facts or *scenes a faire* and consequently there is no substantial similarity of copyrightable material as a matter of law.

(i) Historical Facts

It is well-settled that petitioner cannot gain copyright protection for the historical facts contained in his book, *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F. 2d 1157, 1170 (9th Cir. 1977), *Fuld v. National Broadcasting Company, Inc., supra,* as a copyright in a work gives no copyright protection for public domain material contained therein. *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F. 2d 533 (2d Cir. 1938); *American Code Co. v. Bensinger*, 282 F.2d 820 (2d Cir. 1922); *Lake v. Columbia Broadcasting System, Inc.*, 140 F. Supp. 707 (S.D. Cal. 1956). Moreover, since the petitioner's work deals with a historical event, his burden of proof is higher in that he must show *greater* substantial similarity in order to establish a claim of infringment. *Gardner v. Nizer*, 391 F. Supp. 940, 943 (S.D.N.Y. 1975); *see Oxford Book Co v. College Entrance Book Co.*, 98 F. 2d 688 (2d Cir. 1938).

The rule does not change simply because it may have been petitioner who discovered the facts presented. *Rosemont Enterprises, Inc. v. Random House, Inc., supra; see Norman v. Columbia Broadcasting System, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971). Succinctly stated, substantial similarity sufficient to evidence copying *may not* be inferred from similarities of two works resulting from the narration of the same historical events, *Fuld v. National Broadcasting Company, Inc., supra, Greenbie v. Noble*, 151 F. Supp. 45, 68 (S.D.N.Y. 1957), because "[w]here two stories deal with the same general subject matter, similarities of *names, events,* and *locales* are without legal significance." *Fuld v. National Broadcasting Company, Inc., supra* at 881 (emphasis added); *DeMontijo v. Twentieth Century-Fox Film Corp.*, 40 F. Supp. 133 (S.D. Cal. 1941).

Petitioner's claimed similarities involve actual individuals and events. Thus, in both works there are references to those who were on board the Hindenburg's last vogage, *e.g.*, Ernst Lehmann, Captain Pruss, Rigger Knorr, the mess boy, Joe Spah, Col. Erdmann (Ritter in the film), Eric Spehl (Boerth in the film), Chief Steward Kubis, the Doehner family (Breslau family in the film), and those on the ground who were also involved, *e.g.*, the German Ambassador to the United States, Kathie Rauch, Adm. Charles Rosendahl (Adm. Fellows in the film), Hugo Eckner, Dorothea Erdmann (Eleanor Ritter in the film), Hilda Schmidt (Freda Halle in the film), Herb Morrison, and representatives of the New York police (SA054).

In both works, actual events are discussed such as the Rauch letter (SA014-016), the Hindenburg's launch and course, the airship's delay on landing, the explosion in the rear of the craft, the confusion on board, Joe Spah's historic leap from the ship, Herb Morrison's radio commentary, and the investigation into the Hindenburg's destruction, including the theory of sabotage. These similarities are without legal significance. In *Echevarria v. Warner Brothers Pictures, Inc.*, 12 F. Supp. 632, 638 (S.D. Cal. 1935), noted copyright jurist, Judge Yankwich stated:

> One cannot build a story around a historical incident and then claim exclusive right to the use of the incident. If originality can be claimed in opposing Aguinaldo to Funston, as the plaintiff claimed in open court, then all the novels, short stories, and dramas written about the Civil War, opposing Grant and Lee, might never have been written after the first one because the author of the first one could have claimed exclusive right to the product.

As each work is based upon a historical event, similarity in mere sequencing of events is of no probative value because the sequence in both works must perforce be the same. As stated by Judge Learned Hand:

> . . . [S]ince the narration of history must proceed chronologically, — or at least, such is the convention, — the order in which the facts are reported must be the same in the case of a second supposed author.

Myers v. Mail & Express Company, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919).

In *Fuld v. National Broadcasting Company, Inc., supra*, the court, quoting from the same opinion stated:

> There cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection, although into that selection may go the highest genius of authorship, for indeed, history depends upon a selection from the undifferentiated mass of recorded facts.

390 F. Supp., *supra* at 882, quoting Judge Learned Hand in *Myers v. Mail & Express Company*, 36 C. O. Bull. 478, 479 (S.D.N.Y. 1919); *also, Norman v. Columbia Broadcasting System, Inc.*, 333 F. Supp. 788 (S.D.N.Y. 1971).

Therefore, the petitioner here cannot point to any similarity of sequencing of events alone or in conjunction with his theory as proof of substantial similarity. Neither is amenable to copyright protection.

Indeed, the court in *Richards v. Columbia Broadcasting System, Inc.*, 161 F. Supp. 516, 518 (D.D.C. 1958), noted that the crucial rule to remember is that

> [t]he fundamental idea of an original work may even be borrowed as long as the specific details of the author's literary efforts are not copied.

In practical terms this means that:

> *[t]he second author may also adopt the first author's historical ideas and theories since the law of copyright only protects an author's mode of expression and not his ideas.*

Greenbie v. Noble, 151 F. Supp. 45, 67 (S.D.N.Y. 1957). (Emphasis added.)

Both the district court and the court of appeals correctly found that petitioner owns no copyright in the facts set forth in his book.

(ii) Purported Facts

Aside from the facts of the Hindenburg disaster that are generally known from sources other than petitioner's book, his book clearly represents itself to be a factual account of the last flight of the Hindenburg. Of his own work, petitioner states:

> This, however, is the *chronicle* of those who would — and did — harm a dirigible . . . .

Who Destroyed the Hindenburg? (p. XIV). (Emphasis added.)

In addition, petitioner's book is labeled as a non-fiction work, and although he contended at the outset of this lawsuit that said work was fiction (*see, e.g.*, SA144), petitioner now admits, as he must, that *Who Destroyed the Hindenburg?* is a work of non-fiction (Petitioner's Brief at 5).

Two related consequences flow from this. First, any facts reported by petitioner in his work that were discovered by him alone (assuming that is the case) are no more copyrightable than any other facts, notwithstanding his research to find said facts. *See, supra.* Second, as to those matters in his book which indeed

are not facts, but were represented to be such, he is now estopped to deny that they are facts. As stated in *Greenbie v. Noble*, 151 F. Supp. 45, 67 (S.D.N.Y. 1957):

> "...[*H*]*e who puts forth a thing as verity shall not be heard to allege for profit* that it is fiction." Davies v. Bowes, D.C.S.D.N.Y., 1913, 209 F. 53, 55, affirmed 2 Cir., 1914, 219 F. 178.

(Emphasis added.)

That rule was reaffirmed in *Huie v. National Broadcasting Company*, 184 F. Supp. 198, 199-200 (S.D.N.Y. 1960):

> Plaintiff counters with a demonstration that several of the episodes which appear in both works are the products of his imagination and thus may not be classed as historical facts. Defendants' reply to this is that plaintiff *represented his story to be a true* story and that he is *estopped to say* that the episodes are not historical.
>
> *Defendants are correct in this position.*

(Emphasis added.) *Also, Lake v. Columbia Broadcasting System, Inc.*, 140 F. Supp. 707 (S.D. Cal. 1956).

Indeed, even if petitioner had not called his book a chronicle, its mere presentation as a factual account, without express language to that effect, would prevent him from claiming that his work is not a work of historical fact. *Davies v. Bowes*, 209 Fed. 53 (S.D.N.Y. 1913), *aff'd*, 219 Fed. 178 (2d Cir. 1914). The creation of a new rule to the contrary would put an unconscionable burden on the author of any succeeding work and would effectively bar the use of secondary source material.

(iii) Scenes a Faire

Other claimed similarities between the book and the film asserted by petitioner arise from the fact that any two treatments of an actual historical event such as the Hindenburg air disaster will in all probability have common elements, *e.g.*, a discussion of prior lighter-than-air craft, baggage searches prior to boarding (JA339 ¶17), discussion of possible sabotage while on board, scenes of the passengers during the voyage, scenes of the landing and of the dirigible exploding (JA347 ¶¶46, 48, 57, 59, 63, 64, 69), scenes of the crowd waiting at Lakehurst and scattering on the airship's fiery descent, scenes of passengers trying to escape the flames or tumbling about the ship during the crash, Joseph Spah's famous leap from the burning airship, Herb Morrison's memorable radio commentary during the disaster and scenes of rubble after the fire (JA351 ¶¶63, 69). Of course, where sabotage is the main thrust of the story, as in Universal's motion picture, then it follows that scenes of FBI and police investigations (JA346 ¶42), likely bomb sites (JA349, 352 ¶¶55, 73), discussions of anti-Nazi plots (JA335 ¶3), prior sabotage attempts (JA336 ¶6), and the checking of suspects and the like are to be expected. Petitioner points to each of the above as an example of copying. Obviously, no cause of action may be sustained on such a basis. *Alexander v. Haley, supra; Reyher v. Children's Television Workshop, supra.*

These types of similarities were discussed by Judge Yankwich in his article *Originality in the Law of Intellectual Property,* 11 F.R.D. 457 (1951), wherein he noted that in a case where one scene must follow a given situation, similarities are not the result of copyright infringement:

> These cases indicate that when you are dealing with a common idea, no matter how different the treatment may be, common elements will speak in both products. Insofar as these common elements are distinct, they amount to creative

> originality. And, in so considering them, the similarities which are traceable to the common source are disregarded. But similarities may appear which are inherent in a situation. The French refer to them as *scenes a faire,* — that is, scenes which *must* follow a certain situation.

Yankwich, supra at 462 (emphasis in original); *Reyher v. Children's Television Workshop, supra* at 91.

Indeed, a brief glance at part of petitioner's list of claimed similarities between the film and his book set forth in Universal's Appendix shows the specious nature of his claim.

Petitioner's claims refer to (1) historical fact; (2) events represented to be historical fact by petitioner; (3) *scenes a faire;* (4) purely fictional situations invented by Nelson Gidding, none of which is copyrightable by the petitioner; and (5) completely dissimilar scenes. *See Norman v. Columbia Broadcasting System Inc.,* 333 F. Supp. 788 (S.D.N.Y. 1971).

In comparing the actual text of Mr. Hoehling's work with the final exhibited version of the motion picture, he does not, and indeed cannot, point to any probative textual duplications of expression (SA028).[5] A comparison of the two works clearly shows that any similarity is based upon the fact that both are relating the same historical event and any similarity of ideas and theories, which are not protectable, is only a result of the common subject matter, cliches and *scenes a faire.*[6]

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5. *See* Judge Metzner's opinion at pp. 6-7 (JA081-082; A20, 21).

6. Indeed, petitioner's recognition of the lack of probative similarities between his work and Universal's film is evidenced by his reliance on the so-called "Inverse-Ratio Rule" (Petition at 31) which states that the greater the degree of access shown, the less a plaintiff need show of substantial similarity. This "rule" has been expressly rejected in *Arc Music Corp. v. Lee,* 296 F. 2d 186 (2d Cir. 1962) and cannot be employed by petitioner to circumvent his obvious inability to satisfy his burden of establishing substantial similarity.

II.

NO CONFLICT AMONGST THE CIRCUITS EXISTS.

Petitioner cannot claim that by employment of a theory similar to his, and by using his book for factual background research, Universal appropriated his research. 2 *Nimmer on Copyright* §3.04 at 3-15, 3-16 (perm. ed. rev. 1980) (hereinafter "*Nimmer*"). With respect to the alleged copyrightability of petitioner's research, noted copyright commentator Prof. Melville Nimmer has stated:

> No one may claim originality as to facts. Facts may be discovered, but they are not created by an act of authorship. One who discovers an otherwise unknown fact may well have performed a socially useful function, but the discovery as such does not render him an "author" in either the constitutional or statutory sense.

2 *Nimmer* §2.11(A) at 2-158.

Consequently, the researcher is not an "author" of a "writing" that is capable of copyright protection. To hold otherwise could allow *only* the researcher who discovered the fact to write about it, and that would violate the intent of the copyright clause and would simply end debate, discussion and research with respect to such issues. However, even were that not the case, Universal cannot be said to have appropriated petitioner's research. As Mr. Hoehling himself has admitted (Exhibit 1001, SA144), at most, Universal adopted only his basic theory of Eric Spehl as the Hindenburg's saboteur.

Petitioner has attempted to conjure up a conflict in the circuits by citing *Toksvig v. Bruce Publishing Co.*, 181 F. 2d 664 (7th Cir. 1950). As discussed below, *Toksvig* was decided on an issue very different from the one involved in this case and is readily distinguishable.

Petitioner's request for a writ presents no area of controversy not previously before and rejected by this Court. One of the foundation stones of the Second Circuit opinion in this case is *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967).

In *Rosemont,* the Second Circuit as far back as 1966 specifically rejected the reasoning of *Toksvig,* when it said, *inter alia:*

> We, however, cannot subscribe to the view that an author is absolutely precluded from saving time and effort by referring to and relying upon prior published material *Cf. Oxford Book Co. v. College Entrance Book Co.*, 98 F. 2d 688 (2d Cir. 1938). It is just such wasted effort that the proscription against the copyright of ideas and facts, and to a lesser extent the privilege of fair use, are designed to prevent.

Rosemont Enterprises v. Random House, Inc., supra at 310; also quoted in *Norman v. Columbia Broadcasting System, Inc.*, 333 F. Supp. 788, 796 (S.D.N.Y. 1971).

This Court denied certiorari in *Rosemont* and should do so in the instant case.

Yet there is even a more striking reason why *Toksvig* fails to aid petitioner. In *Eisenschiml v. Fawcett Publications, Inc.*, 246 F. 2d 598 (7th Cir.), *cert. denied,* 355 U.S. 907 (1957) the Seventh Circuit distinguishing *Toksvig,* found that the defendant had not made an unfair use of plaintiff's books *Why Was Lincoln Murdered?* and *In The Shadow of Lincoln's Death* in the creation of his article on the same subject entitled "America's Greatest Unsolved Murder". Plaintiff alleged that the defendant appropriated the underlying "theme" of his works, — "the theme that Secretary of War Stanton may have been implicated in the

assassination, that obstacles were deliberately placed in the way of Booth's capture, and that there are other unexplained mysteries". *Id.* at 601. The Master found for defendant and the Seventh Circuit, the circuit of *Toksvig,* affirmed.

Eisenschiml reveals the major and obvious distinction between this case and *Toksvig. Toksvig* was a *fair use* case and did not turn on the copyrightability of ideas, historical themes, tneories or speculations. *See Public Affairs Associates, Inc. v. Rickover,* 284 F. 2d 262, 272 (D.C. Cir. 1960). Contrary to petitioner's obviously strained effort to bring this action within Rule 17 of the Rules of this Court, there in fact exists no conflict in the circuits.[7]

III.

THE COURT SHOULD CONSIDER ONLY THE ALLEGEDLY INFRINGING WORK.

In his petition, Mr. Hoehling makes no attempt to show any similarity between his book and the film, and even as to respondent Mooney petitioner relies heavily on Mooney's preparatory notes in an attempt to establish a case of substantial similarity. It is well-settled law, however, that where the infringing item is alleged to be a motion picture, the plagiarism *must be found in the film alone.* For example, in *Cain v. Universal Pictures Co.,* 47 F. Supp. 1013, 1017-18 (S.D. Cal. 1942) the court stated:

> [T]he wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or

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7. Since *Miller v. Universal City Studios, Inc.,* 460 F. Supp. 984 (S.D. Fla. 1978), *appeal pending,* has not yet been argued before the Fifth Circuit it can hardly be used to create a conflict in the circuits.

> incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.

In *DeMontijo v. Twentieth Century-Fox Film Corp.*, 40 F. Supp. 133, 138 (S.D. Cal. 1941), the court held that "the ultimate test of infringement must be the motion picture film as actually produced, and exhibited," and in *Fuld v. National Broadcasting Company, Inc.*, 390 F. Supp. 877, 882 n.4 (S.D.N.Y. 1975), the court refused to consider alleged similarities between plaintiff's script and defendant's script when the alleged similarities did not also appear in defendant's movie.

> Since the ultimate test of infringement must be the television film as produced and broadcast — and not the preliminary scripts — we have confined our analysis to the remaining . . . scenes which were in the film as produced and broadcast.

Consequently, the court should look to the film and not to vague references of notes of a co-respondent or even to scene descriptions in "The Hindenburg" screenplay that do not actually appear in the film.

Petitioner acknowledges on page 17 of his petition that he has no case against the film "The Hindenburg" itself, but that whatever case he has is against the book and that the case against the film is entirely *derivative.* Both the district court and the court of appeals recognized the distinct and separate characteristics of the film. The court of appeals specifically acknowledged that the motion picture was not a mere film version of Mooney's book, but instead was a different work and followed a different "Grand Hotel" formula so common to "disaster films".

Beyond the general story line, petitioner's and Universal's works are entirely dissimilar in their respective thematic and episodic treatments. Each is distinct from the other in selection of plot incidents founded on public domain sources and in the arrangement and adaption of such incidents.

The pattern of the two works is entirely different. As stated by the district court, petitioner's book is in two parts, the first describing in reportorial fashion the last voyage of the Hindenburg and the second reporting the official investigations of the disaster and, in the last few pages, the author's theory of the destruction. Universal's film centers upon its protagonist, Ritter, and his internal conflict regarding his assignment to protect the Hindenburg and his hatred for his superiors and the Nazi regime. The climax of the film involves the irony of Ritter's eventual about-face and joining forces with the saboteur in bringing about the Hindenburg's destruction (JA238-240). Moreover, the film proceeds chronologically with the saboteur revealed through the course of the action. Nor is there any question as to his identity.

Whereas petitioner's book purports to be a scholarly historical account or "chronicle" which proposes a plausible, if not universally accepted, theory of the Hindenburg's destruction, Universal's film, while containing some facts common to petitioner's book, is primarily an entertainment "detective" film in which the audience follows Ritter through the ship as he investigates each passenger "suspect" as a potential saboteur. Any remaining resemblance between the two works arises from the nature of the common subject matter.

Petitioner, at his own peril, fails to come to grips with the fact that the two works are completely different works, apart from the most general of plots. *This alone should merit a denial of the petition as to respondent Universal.*

This action, now five years old, is based upon petitioner's misconception of what is subject to copyright protection. As

stated by the court in *Rosen v. Loew's, Inc.*, 162 F. 2d 785, 788-789 (2d Cir. 1947):

> In copyright we have become accustomed to actions without shadow of merit. Apparently the conviction of which authors and composers cannot be disabused, extends to their assignees; that the finest gossamers of similarity can be made to serve. The prizes are large; the security of the foundation often seems to be in inverse proportion.

IV.

SUMMARY JUDGMENT WAS APPROPRIATE IN THE PRESENT ACTION.

Petitioner cites *Arnstein v. Porter,* 154 F. 2d 464 (2d Cir. 1946), to support his position that the district court erred in granting summary judgment for respondents. However, *that test has long since been abandoned. SEC v. Research Automation Corporation,* 585 F. 2d 31 (2d Cir. 1978); *Dressler v. M.V. Sandpiper,* 331 F. 2d 130 (2d Cir. 1964). *Moore's Federal Practice* ¶56.17(14).

In *Millstein v. Leland Hayward, Inc.*, 10 F.R.D. 198, 199 (S.D.N.Y. 1950), where the defendant had, as here, conceded access, Judge Rifkind granted the defendant's motion for summary judgment.

> Ever since *Arnstein v. Porter,* 2d Cir. 1946, 154 F.2d 464, district courts have treated motions for summary judgment in plagiarism suits with caution. But unless Rule 56 is to be completely nullified in this type of action, it requires that judgment be granted to the defendants in this case. If Rule 56 is impotent to protect the

> defendants in this case against the expense of trial, it might as well be excised from the federal rules.

Id. at 199.

Summary judgments have been granted frequently in cases of alleged copyright infringement in recent years. *See, e.g., Alexander v. Haley, supra; Musto v. Meyer, supra; Fuld v. National Broadcasting Company, supra; Gardner v. Nizer, supra; Costello v. Loew's Inc.*, 159 F. Supp. 782 (D.D.C. 1958); *Miner v. Employers Mutual Liability Ins. Co.*, 229 F. 2d 35 (D.C. Cir. 1956); *Buckler v. Paramount Pictures, Inc.*, 133 F. Supp. 223 (S.D.N.Y. 1955). Application of *Arnstein* would be inappropriate in any case here even if it were still good law since in *that* case there was a triable issue of fact on the question of *access* and in this action the respondents conceded access. The only remaining issue was of substantial similarity of protectable material and this issue may be determined by the Court through a comparison of the two works. *Alexander v. Haley, supra; Musto v. Meyer, supra; Fuld v. National Broadcasting Company, supra; Dugan v. American Broadcasting Corporation*, 216 F. Supp. 763 (S.D. Cal. 1963); *Costello v. Loew's, Inc., supra; Nimmer* §§13.01(B) and 13.03(A). The district court properly made that comparison and then granted Universal's and Mooney's motions for summary judgment and the Second Circuit affirmed that decision.

Nor was Universal's renewed motion for summary judgment barred by the prior denial of the motion by the United States District Court for the District of Columbia. A prior denial of summary judgment does not bar a party from renewing the motion. *Kirby v. P.R. Mallory & Co., Inc.*, 489 F. 2d 904 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F. 2d 380 (2d Cir. 1968); *Brownfield v. Landon*, 307 F. 2d 389 (D.D.C.), *cert. denied*, 371 U.S. 924 (1962); *Bon Air Hotel v. Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970); *Dictograph Products Co. v. Sonotone*

Corp., 230 F. 2d 131 (2d Cir. 1956); *GAF Corp. Circle Floor Co.*, 329 F. Supp. 823 (S.D.N.Y. 1971), *aff'd*, 463 F. 2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973).

The cases clearly show that a previously denied motion for summary judgment may be granted when an expanded record demonstrates that there is no triable issue of fact, *see, e.g., Middle Atlantic Utilities Co. v. S.M.W. Development Corp., supra; Brownfield v. Landon, supra.*

Judge Smith's denial of Universal's original motion for summary judgment was made prior to the taking of any discovery whatsoever. Therafter the parties engaged in extensive discovery over a three-year period prior to the resubmission of the motion on October 19, 1978. On the basis of that expanded record and the two works, the district court found that there was no triable issue of fact and the court of appeals affirmed that judgment.

V.

ABSENT INFRINGEMENT, PETITIONER'S UNJUST ENRICHMENT CLAIM BASED UPON UNFAIR COMPETITION WAS ALSO CORRECTLY DISMISSED.

In addition to his copyright infringement claim, petitioner has also made a claim of unjust enrichment. However, as Universal has shown, there has been no infringement of the petitioner's work and therefore his claim for unjust enrichment, based as it is on his claim of infringment, falls under the doctrine of federal preemption.

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 223 (1964) and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), known collectively as the *Sears/Compco* doctrine, make it perfectly clear that when a work is unprotected or unprotectable by copyright it may be copied at will. *B. H. Bunn Co. v. AAA Replacement Parts*, 451 F. 2d 1254 (5th Cir. 1971);

Ideal Toy Corp. v. Kenner Products, 443 F. Supp. 291 (S.D.N.Y. 1977); *Sinatra v. Goodyear Tire & Rubber Co.,* 435 F. 2d 711 (9th Cir. 1970).

Nor was the doctrine of unfair competition, with respect to uncopyrightable elements, enlivened by *Goldstein v. California,* 412 U.S. 546 (1973). The Court in that case held that the State of California could protect sound recordings infringed prior to 1972 even though no such protection was afforded under federal statutory law until 1972. The Court in *Goldstein* rejecting the claim that the copyright field was preempted by federal legislation in the area and holding that the Congress had *neither expressed its wish to protect nor not to protect* sound recordings manufactured before 1972, found that the State of California could act to protect such recordings. Congress has acted to protect the broad category of literary writings and has also expressed its wish that the "ideas" contained within those writings should not be capable of protection. Consequently, petitioner cannot protect through the back door what he could not protect throught the front. *Triangle Publications, Inc. v. Sports Eye, Inc.,* 415 F. Supp. 682 (E.D. Pa. 1976); *Jacobs v. Robitaille,* 406 F. Supp. 1145 (D.N.H. 1976). Ideas and theories, even if newly researched, are to remain free for all to use.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX [1]

1. Scene 8, an alleged infringing similarity, shows stock newsreel footage of the LZ126, rechristened *The Los Angeles*, with a voice-over explanation.

2. Scene 9, alleged to infringe plaintiff's work shows stock newsreel footage of the airship Graf Zeppelin again with a voice-over explanation.

3. Scene 11-A, alleged to infringe, shows the inside of the Hindenburg.

4. Scenes 374 through 376, 399, 472, 474 and 475, alleged to infringe, are a re-enactment of Herb Morrison's *actual historic radio broadcast* of the air disaster.

5. Scene 419, alleged to infringe, is *stock newsreel footage* of the actual Hindenburg explosion.

6. Scenes 429-A through F, alleged to infringe, show a re-enactment of Joseph Spah's famous jump from the burning airship.

---

1. The list referred to is from petitioner's answers to Universal's first set of written interrogatories (JA275-277). As petitioner did not favor Universal with the specific page of his work that each of the above is alleged to have infringed (JA274), Universal cannot prepare a side-by-side comparison. It should be clear nevertheless, that each of the above scenes is a non-copyrightable *scene a faire, see infra.* It should be noted, however, that it is difficult to discuss petitioner's alleged similarities since they change with each new pleading, *see, e.g.,* petitioner's answers to defendant Universal's interrogatories (JA274), petitioner's supplemental interrogatory answers (JA282), petitioner's memorandum of law in opposition to Universal's motion for summary judgment and petitioner's supplemental memorandum of law (JA331). Never are petitioner's so-called similarities described the same way twice. However, since the district court decision specifically referenced the similarities as stated in petitioner's supplemental memorandum of law, Universal will also refer to the allegations as they are set forth in that argument.

7. Scene 308, alleged to infringe, reads as follows:

EXT. THE HINDENBURG AND AIRFIELD — DAY — MATTE

Approaching the field, she appears out of dark clouds. Lightning flashes, followed by distant thunder. Carnival atmosphere outside the fence. Cars arriving . . . vendors selling Eskimo pies, hot dogs, pennants and long balloons marked "Hindenburg" . . . People crowd the fence, standing on car tops.

8. Scene 407, alleged to infringe, reads:

INT. THE HINDENBURG — DAY — DINING ROOM PROMENADE

Passengers crowd the observation windows; Breslau, Valarie, wearing white gloves and holding a picture hat; the two boys in Buster Brown suits; the sweet-faced old lady carrying a carpetbag; and others. With a muffled thump the ship shudders.

9. Scene 407-A, alleged to infringe, reads:

EXT. HINDENBURG — DAY — STOCK #1A

The flaming ship tilts sharply aft.

10. Scene 407-B, alleged to infringe, reads:

INT. 'A' DECK PROMENADE — DAY

Passengers at the observation windows are tumbled down the slanted deck, piling on top of

each other, shouting, screaming, the dining salon furniture crashing into them.

11. Scene 413, alleged to infringe, reads:

EXT. LANDING CIRCLE & DAY — WIDE ANGLE — SHOOTING DOWN

Sailors and civilians scatter wildly. People, cars, the mast, the ground, light up in the glow.

12. Scene 434, alleged to infringe, reads:

INT. 'B' PASSAGEWAY — DAY

Arm in arm, Pajetta, Napier and the Countess move along the slanted passage through smoke and occasional flame. Napier hugs the backgammon board. Pajetta taps exploringly with his cane at the obscured floor. A cracking sound . . . The smoke partially clears. Before them the debarkation stairway, burned from its fitting, falls into place on the ground. Unsurprised by this stroke of luck, Napier gestures 'after you' to the Countess. He and Pajetta hurry behind her down the stairs.

(Any claimed similarity with respect to this scene is especially remarkable since each of the above characters is a fictional creation of author Gidding and none of these characters appears in plaintiff's work.)

13[2]. Petitioner's comparison No. 31 (JA342-343):

---

2. Comparisons 13-17 are taken from the seventy-five alleged instances of copying as set forth in petitioner's latest incarnation of similarities, his supplemental memorandum of law in opposition to Universal's motion for summary judgment (JA331, *et seq.*). These so-called similarities were specifically referenced by Judge Metzner.

Petitioner's book, p. 30, lines 17-20:

Now, the hatchways were finally secured, and the *Hindenburg* again was made ready for the command so familiar to those of the lighter-than-air fraternity: "Up ship!" Neither passengers nor spectators had many seconds to wait.

Universal's scenes 70-A through 70-C, alleged to have infringed p. 30, lines 17-20:

70-A ANGLE PAST ONLOOKERS TOWARD PROMENADE WINDOWS — MATTE

Onlookers watch the passengers and wave farewell.

70-B INT. CONTROL CAR — NIGHT — PROCESS

Pruss leans out the window, shouting through the megaphone:

PRUSS

Up Ship!

70-C EXT. HINDENBURG — NIGHT — DOWN SHOT

as linesmen drop their ropes.

14. Petitioner's comparison No. 33 (JA343):

Petitioner's book, p. 33, lines 21-26:

By 8:30 the *Hindenburg* was droning along at her cruising speed of 77 knots. The *Normandie*, the

Queen Mary and the *Europa* might be greyhounds of the seas, but there was nothing fast or even sleek about the portly *Hindenburg*. She was the truck horse, the slow, Victorian-comfortable brougham of the airways.

Universal's scene 241 alleged to have infringed p. 33, lines 21-26:

241 ANGLE ON RITTER AND DOUGLAS

RITTER
(looking up)
You'd better tell me about this, Mr. Douglas.
(reaching in pocket)
And while you're at it also explain these in code.

DOUGLAS

I don't have to explain a damn thing to you. Get out.

Ritter's answer is to lock the door. Douglas glances uneasily at his watch.

RITTER

Set it back to Frankfurt time, Douglas. That's where a fast police car will be meeting you in —
(glancing at watch)
roughly ninety-four hours — barring accidents, of course.

Measuring him, Douglas decides on another approach.

DOUGLAS

Okay, I'll tell you, Ritter — but you gotta let me send that message. It may mean the difference.

RITTER

To what?

DOUGLAS

To pulling off the biggest deal of my life. Right now I'm in a race to beat my competitor into New York.

RITTER

Who?

DOUGLAS

Fred Seemans, head of Seemans & Poelzig. He's on the *Queen Mary*. Left a day and a half before us. In the messages we call his outfit the Sharks, mine the Hawks.

RITTER
(half-smiling)
By sea and by air and both carnivorous.

DOUGLAS

Tomorrow it'll be announced that General Motors has acquired the Opel Motor Company. The advertising account will be up for grabs. The outfit getting there first will have the jump.

RITTER

Well, let's just find out if there is a Fred Seemans aboard the *Queen Mary.*

15. Petitioner's comparison, No. 41 (JA343):

Petitioner's book, p. 54:

On into the wild night sailed the Hindenburg, her motion gentle, like the rockings of some great cradle, the drum-roll of the wind and rain against her sixth-of-a-mile length a lullaby. On flew this giant of human creation, easily carrying its burden of ninety-seven human beings, its cargo of mail, of films and tobacco leaves, partridge eggs, fancy goods, airplane parts, propaganda material, two dogs and . . .

. . . and something else, far from inocuous, something meticulously hidden and *not* to be found on the manifest. It was not quite ready yet. Its assemblage was not entirely complete. But it was there, waiting. (Ellipses and emphasis in original).

Universal's scenes that allegedly infringe p. 54:

37 CLOSEUP — THE BOMB WITH WORKS EXPOSED (SEE APPENDIX #3)

Held in a hand, it is a rectangle about 2" wide and 5" long with complicated wheels and tiny gears. It is being tested. In utter silence the black timer needle revolves. When it reaches the detonation point, it stops with a click.

111 CLOSEUP — THE BOMB

held in the same hand, but behind it now is the throb of the ship's engines establishing beyond all doubt that the bomb is aboard the *Hindenburg*.

247 MONTAGE

A) SMOKING ROOM

Ritter stares out the window. Napier, sitting with Pajetta, the Countess, Howell and the Japanese diplomat, opens a new pack of cards to begin a poker game. Ritter leaves, exchanging a look with the Countess.

B) RADIO ROOM

As Ritter enters, Speck turns, shakes his head "no news."

C) CLOSEUP OF THE BOMB

in the same hand as before. The saboteur's eye lowers to an inch of it, inspecting the infernally compact mechanism.

16. Petitioner's comparison, No. 48 (JA347):

Petitioner's book, p. 74, lines 7-11:

. . . host of amateur and semi-amateur cameramen. Among the latter was George Willens, head of a Detroit firm of advertising typographers, who would take movie films of the *Hindenburg's* arrival. Then with his seventeen-year-old son, Harvey, he was booked for the airship's return voyage.

Universal's scene 263 alleged to have infringed p. 74, lines 7-11:

> 263 INT. HANGAR — DAY — WAITING ROOM SECTION
>
> Some thirty men, including Zeppelin Company officers, New Jersey Police, U.S. Customs and Immigration officials, reporters and Detectives Moore and Grunberger, organize themselves for the arrival of the *Hindenburg*.

17. Petitioner's comparison, No. 50 (JA348):

> Petitioner's book, p. 81, radio message:
>
> At 3:30 DEKKA advised NEL:
>
> COURT LAKEHURST PLEASE SEND WEATHER.
>
> The answer sped back in five minutes:
>
> BROKEN CUMULUS CLOUDS SURFACE WIND 20 KNOTS BAROMETER 29.63 FALLING SLOWLY
>
> Then Pruss, mindful of necessary but non-operational considerations, ordered the information transmitted:
>
> CREW DINNER WILL BE SERVED ON BOARD.
>
> At this time, Lehmann himself wirelessed a tribute to Hamburg, where a memorial was being unveiled by the Hamburg . . .

Universal's scene 31 alleged to have infringed p. 81's radio message:

311 INT. HINDENBURG -- DAY — CONTROL CAR

DIMMLER

Signal red, Captain.

PRUSS

(behind him)

Thank you kindly. I thought it was a Christmas tree.

(to Speck at phone)

Send this to Fellows: Riding out weather. Shall delay landing until further notice from NAL. Looking forward to dinner. Pruss.

Supreme Court, U.S.
FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

No. 79-2029

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OCTOBER TERM, 1979

A. A. HOEHLING,

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MICHAEL MACDONALD MOONEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT MICHAEL M. MOONEY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1979

A. A. HOEHLING,

Petitioner,

vs.

UNIVERSAL CITY STUDIOS, INC., and MICHAEL MACDONALD MOONEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT MICHAEL M. MOONEY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Second Circuit Court of Appeals correctly rule that ideas, theories, and historical facts and research per se are not capable of copyright protection?

2. Did the Second Circuit Court of Appeals correctly rule that Federal law preempts state law protection of those elements of petitioner's book which are non-copyrightable and in the public domain?

COUNTERSTATEMENT OF THE CASE [1]

The Genesis Of This Suit

Petitioner's "chronicle" and "documentary" (P.Bk. at xiv, 19), titled "Who Destroyed The Hindenburg?", appeared in 1962 and thereafter went out of print. JA 258, 736. Mooney's book "The Hindenburg" was published ten years later, in 1972. JA 25. Petitioner claimed "plagiarism" before reading Mooney's book, which was more successful than his.[2] JA 754, 1071, 1074. After he read the book, however, petitioner wrote to his publisher that "It's a different book;" noting that Mooney "went to Germany, I have established . . ., and talked with most of the people I did," petitioner concluded that apart from his "pique," "the case is closed." JA 1041.

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[1] Citations herein to the Joint Appendix and Supplementary Appendix below are in the form "JA" and "SA." Citations to the opinions of the District Court (unreported) and the Court of Appeals (reported at 618 F.2d 972), which appear in the appendix to the Petition, are in the form "App." Petitioner's book is cited "P.Bk.", and Mooney's "M.Bk." We do not deal here with the facts concerning respondent Universal City Studios, Inc. ("Universal"); those are covered in Universal's Brief in Opposition, cited herein as "U.Br."

[2] As petitioner's agent wrote to him at the time: "I don't blame you for being burned up because someone else's Hindenburg story is outselling the one you did. That is human nature. . . . Walter Lord was certainly not the first man to write about the Titanic, and I'm sure the previous authors felt hurt when his book outsold theirs." JA 1074.

Two years later, petitioner discerned "considerable financial interest" in respondent Universal's rumored film about the Hindenburg. JA 1070. In late 1975 petitioner sued Universal (JA 15)—having decided to assert that his book was really "fiction," since "[o]therwise, I'd have no claim." JA 1076. Thereafter the suit was transferred to the Southern District of New York (after an attempt to add Mooney as a defendant failed for want of personal jurisdiction) and Mooney was joined. JA 23, 73-74.

The Proceedings And Rulings Below

Discovery ensued. After petitioner's efforts to obstruct discovery on (among others) the "fiction" issue led to an award of costs against him, JA 1055, 1057, 1061-62, petitioner finally admitted that his book was factually accurate, that he intended readers to rely on it as such, and that most of his specific "copying" claims concerned historical facts available from other sources. JA 743, 751, 823-25. It also developed that petitioner's general historical theory—that the Hindenburg may have been sabotaged by:

> ". . . the rigger, Eric Spehl, [who,] influenced by his romance with a woman . . . who had anti-Nazi connections, developed a special type of bomb and placed it against the gas cell number 4 in the Hindenburg" (JA 274)—

was not particularly new. The theory of a bomb planted by a crew member is concededly old hat. JA 775; see ROSENDAHL, WHAT ABOUT THE AIRSHIP? (1938) 21, 24-26, pointing out that a bomb roughly the size of "an ordinary fountain pen" could be made "relatively simpl[y]," and "would have been hard to detect" if "suspended in a gas-cell trunk"—of necessity Cell 4,

where the fire began. SA 81.[3] Spehl and his girlfriend were hardly unknown. The woman was under suspicion from the first; both she and Spehl were the subject of Gestapo investigation at the time; and "[b]y the end of 1937" Spehl's guilt was a common "rumor" in the Hindenburg family, a "suspicion . . . in discussion" during 1938 and "living obstinately till nowadays." JA 171-73.[4]

Mooney and Universal moved for summary judgment, which the District Court granted on the ground that (a) "Copyright does not protect ideas, theories, or broad outlines" (JA 77-78), so that petitioner's Spehl theory was not protectible, and (b) petitioner's specific "copying" charges on their face involved either items which were "in no way similar" or references to historical facts and stock literary devices not copyrightable as a matter of law (JA 81-83). The Court of Appeals affirmed.

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[3] So with the flashbulb/dry cell elements of the bomb (see Petition at 8). Spehl was a photography buff; it is well known that the elements of a dry cell battery were found in the Hindenburg's wreckage (see Hoehling Dep., 4/26/77, Ex. 30B); and the destructive potential of flashbulbs aboard a hydrogen dirigible was common knowledge. Hoehling Dep. (1979), p. 1240. The Kathie Rauch letter (see Petition at 8) was alike no secret, SA 13-15, and the Heldenkeller (Petition at 8) was a real place, described to petitioner by crew member Lau. Hoehling Dep., 7/21/77, pp. 269-70.

[4] This was the testimony of crew member Lau, introduced by petitioner. Rosendahl also heard the Spehl rumors, SA 9-11, and petitioner conceded that he himself did not fix upon the Spehl theory until after Klaus Pruss (the son of a crew member) wrote him suggesting that the ship was blown up because it was considered "propaganda means of Hitler's Germany" and that Spehl's girlfriend "gave him a parcel containing the infernal machine," which Spehl then "hid . . . near the upper catwalk where actually the first fire was seen". JA 745-50; Hoehling Dep., 4/26/77, Ex. 110-C; Hoehling Dep. (1979), pp. 1239-40, 1242-44.

Pointing out that "it is clear that [petitioner and respondents] relate the story of the Hindenburg differently," App. A-15, the Court of Appeals reiterated the settled principle that "an interpretation of an historical event . . . [is] not copyrightable as a matter of law" (App. A-12) and held, as to petitioner's Spehl theory, that (App. A-12 to A-13):

> ". . . the hypothesis that Eric Spehl destroyed the Hindenburg is based entirely on the interpretation of historical facts, including Spehl's life, his girlfriend's anti-Nazi connections, the explosion's origin in Gas Cell 4, Spehl's duty station, discovery of a dry-cell battery among the wreckage, and rumors about Spehl's involvement dating from a 1938 Gestapo investigation. Such an historical interpretation, whether or not it originated with Mr. Hoehling, is not protected by his copyright and can be freely used by subsequent authors."

As to petitioner's specific "copying" charges, the Court of Appeals observed that "many of [petitioner's copying] allegations are patently frivolous," that "[t]he vast majority of the remainder deals with alleged copying of historical facts," and that the balance reflected "random duplications of phrases and sequences of events" or "*scenes a faire*, that is, 'incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.'" App. A-13 n.6, A-14. These, therefore, were not capable of copyright protection. "[S]tandard literary devices" and *scenes a faire* "are not copyrightable as a matter of law," App. A-14 to A-15; and "factual information is in the public domain," so that each respondent "had the right to 'avail himself of the facts contained' in [petitioner's] book and to 'use such information, whether correct or incorrect, in his own literary work.'" App. A-13.

Finally, the Court of Appeals held that in view of the copyright laws' commitment of ideas, historical theories, and facts to the public domain, state or common law protection of those elements under the rubric of "unfair competition" was precluded. "Where, as here, historical facts, themes, and research have been deliberately exempted from the scope of copyright protection to vindicate the overriding goal of encouraging contributions to recorded knowledge, the states are preempted from removing such material from the public domain." App. A-16.

The Two Books And Petitioner's "Copying" Claims

As the courts below held (see App. A-10, A-13 to A-14), since the subject matter of petitioner's claims is non-copyrightable in any event, it is not necessary to engage in extended analysis of petitioner's "copying" accusations. But some salient points should be briefly noted to correct inaccuracies and omissions in the Petition.

The Books. Save that both deal with the last voyage and crash of the Hindenburg and with the Spehl theory, petitioner's and Mooney's books are not greatly akin. Petitioner's 225-page text is divided into two segments. The first segment (142 pages, nearly two-thirds of the book) is a "factual account, written in an objective, reportorial style," of "the final crossing of the Hindenburg, from Sunday May 2, [1937,] when it left Frankfurt, to Thursday, May 6, when it exploded at Lakehurst." App. A-5. Spehl is mentioned only four times (see P.Bk. at 240). The second segment of the book—"The Quest," pp. 143-225—begins with a 31-page factual report of post-crash events. Then the scene shifts to a 33-page account (P.Bk. at 181-213) of petitioner's in-

terviews. A final 11-page chapter tentatively broaches the Spehl sabotage theory, framed by suggestive questions rather than positive assertions.[5]

While petitioner calls his book a "historical whodunit," JA 729-30, Mooney's 268-page book—which begins with an epigraph from Hobbes' "Leviathan" and throughout "attempt[s] to weave a number of symbolic themes through the actual events" (App. A-6; see JA 350-54)—*assumes* the "who" and concentrates on the "why," playing out the Hindenburg tragedy along more or less allegorical lines. Unlike petitioner, Mooney begins not with the Hindenburg's last voyage but with zeppelins as technological *"dei ex machina"*—as (again from Hobbes) "Automata . . . [that] have an artificiall life"—subject to "the Iron Law of Technology." M.Bk. at 13, 24-25, 35, 51, 64; see generally Chs. 1, 2. Mooney's Hindenburg does not take off until page 138, more than halfway through; and thereafter there is no mystery about the bomb. On the next page we know it is aboard and what it looks like, and by page 216 we have been told outright that Spehl planted it. See App. A-6.

The "Copying" Claims. Petitioner concluded in 1972 that Mooney's was "a different book" from his. JA 1040. It is apparent—and petitioner admits (JA 705-08, 773)—that the two books differ in "overall feel," "style," and "treatment." Petitioner also admitted that, as one might expect from these differences, the great bulk of his "copying" claims concerned only historical facts

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[5] Apart from the last four pages of the book (when we are given a sketchy outline of his background and motivations), even in the second segment of petitioner's book Spehl is not mentioned save for a brief reference to his nightmares (P.Bk. at 201-02) and two hints of mystery (*e.g.*, p. 150: "But Spehl? No one seemed to know Eric Spehl"). See P.Bk. at 240.

available from a variety of sources. JA 823-25; see App. A-13 n.6, A-14, A-20 to A-22.[6]

This was borne out by petitioner's list of "copying" claims (filed separately as "Exhibit AA" in the Court of Appeals). Both courts below found petitioner's claims without substance on their face, and in large part "patently frivolous." App. A-13 n.6, A-14, A-20 to A-22. Fully 232 of petitioner's 265 claims concerned the first, purely factual segment of petitioner's book, almost wholly devoid of anything other than bald historical reportage about the Hindenburg's last flight; as petitioner acknowledged, these claims largely involved the appearance of the same historical facts in both books.[7]

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[6] While it is not of great significance (since historical facts are in the public domain), we must point out that Mooney did *not*, as claimed in the Petition (*e.g.*, pp. 11, 15, 38, 39), "admit" copying "much of [petitioner's] material . . . into his book;" nor was there any such "proof." Mooney read petitioner's book (he credited it as a source in his own work: M.Bk. at 276), took notes on it, and drew (or verified) some details from it—for example, the name of the Heldenkeller. As would any researcher's, his notes (JA 384-433) bore a resemblance to petitioner's book, though they also contain other material. See JA 549-63. It is these *notes*, or an early *outline*, from which all the examples and so-called "admissions" at pages 11-16 of the Petition were drawn. It is not disputed that Mooney spent some six months researching his book (including three months of interviews, both here and in Germany) and amassed several thousand pages of research notes, National Archives material, news clippings and articles, and the like; some 2,000 pages of these materials were produced at Mooney's deposition. JA 165-66, 169, 571-608, 618-39, 776-77, 843-48, 1040.

[7] The Court of Appeals noted ten examples of this sort of thing. App. A-13 n.6. One might mention in addition such things as references to the properties of hydrogen ("Ex. AA," item 5), the bombing of Guernica (item 137), the phrases "Gruss Gott" and "Heil Hitler" (item 7; see App. A-14), and the Horst Wessel Song (item 103; see App. A-14, A-21 to A-22).

Nearly half the claims concerned but 26 pages of Mooney's book, including his description of the Hindenburg's passengers—real persons, as to many of whom Mooney's information is more detailed than petitioner's.[8] Many of the claims were "comparisons" of contrary facts, or facts used by the two writers in wholly different contexts, or facts not found in petitioner's book.[9] And petitioner's list of claims tangibly demonstrated the different organization and treatment of the two books. It went sequentially through Mooney's book, but jumped haphazardly through petitioner's in order to find "similarities."[10]

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[8] See "Exhibit AA," items 55-84, 96-112, 119-29, 179-247. For example, items 80-81 and 116 accuse Mooney of "copying" facts about Joseph Spah. But it is undisputed that Mooney interviewed Spah, and that petitioner did not. Among other things, Mooney (but not petitioner) uses the correct name of Spah's dog. Petitioner admitted that he borrowed the incorrect name he uses from another writer's book. JA 776-77, 848, 853-54.

[9] For example, item 4 "compared" petitioner's reference to an aluminum piano aboard the Hindenburg to Mooney's explanation of why the piano was *not*, in fact, on board. See JA 856, 858. Item 17 compared petitioner's vague reference to "ranking Nazis on board" with Mooney's specific identification—accurate (JA 176) and nowhere found in petitioner's book—of Lau as a Nazi Party and SS member, complete with serial numbers. JA 726-28, 738-39, 847-48, 852. So with the "comparison" given at page 21 of the Petition: petitioner says Clemens "had no flash bulbs," while Mooney notes that in fact his flashbulbs were confiscated.

[10] For example, items 46 through 52, drawn in sequence from M.Bk. at 117-18, were alleged to infringe *in this order* P.Bk. at 165, 11, 61-62, 8, 90, frontispiece, and 63. This disjointed pattern was recurrent; see, *e.g.*, items 85-89, 128-132, 141-153, 176-182.

REASONS FOR DENYING THE WRIT

Just as the Petition frequently garbles the facts, its argument has little to do with the holdings of the courts below. Much of the Petition is simply beside the point. For example, its "fair use" argument (*Pet.* at 39-41) has no bearing here, because the "fair use" doctrine does not even come into play unless it has been determined that the material involved *was copyrightable*. See, *e.g.*, *Gardner v. Nizer*, 391 F.Supp. 940, 943-44 (S.D.N.Y. 1975). The "fair use" doctrine creates a "privilege in others to use *the copyrighted material*" under some circumstances. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), quoting BALL, COPYRIGHT AND LITERARY PROPERTY (1944) 260. Here the courts below held that the material on which petitioner's claims rest was *not* copyrightable. "Fair use" has nothing to do with it.

Similarly, petitioner's claims that the courts below improperly adjudicated factual issues of copying or "fair use" (*Pet.* at 45-47), or "convert[ed] a factual defense" of noncopying into a "legal defense" (*Pet.* at 33-35, 35-39), simply miss the point. The courts below did no such thing. To the contrary, and despite the largely frivolous nature of petitioner's copying claims (see pages 5, 8-9, *supra*), they *assumed* copying for purposes of their decisions. They held that even so, petitioner could not make out a valid claim *because the material involved was not copyrightable*. The Court of Appeals was explicit (App. A-10, A-15):

> ". . . [The District Court] assumed both copying and substantial similarity, but concluded that all similarities pertained to various categories of non-

> copyrightable material. Accordingly, he granted appellees' motion for summary judgment. We affirm the judgment of the district court.
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> "* * *
>
> "All of [petitioner's] allegations of copying, therefore, encompass material that is non-copyrightable as a matter of law, rendering summary judgment entirely appropriate."[11]

Hence the real (and only) issue is whether the subject matter of petitioner's claims—ideas, theories, and historical facts (App. A-11 to A-15, A-18, A-20 to A-22)—is protectible. Relying on more than a half century of settled law, both courts below held that material not protectible. Both courts were clearly correct.

I.

IDEAS, THEORIES, AND HISTORICAL FACTS ARE NOT COPYRIGHTABLE. THIS HAS LONG BEEN SETTLED LAW, AND THERE IS NO CONFLICT AMONG THE CIRCUITS.

Both the purpose of copyright protection under Article I, § 1, cl. 8 of the Constitution and the policy of the Copyright Act, 17 U.S.C. § 101 *et seq.*, has always been to encourage—not restrict—growth in the stock of

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[11] While this renders petitioner's "factual adjudication" argument irrelevant *ab initio*, we also note that there is no magic quality to charges of copying or substantial similarity which as a matter of law bars their adjudication on a properly supported motion for summary judgment. The "slightest doubt" test of *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), was abandoned sixteen years ago, *Dressler v. M/V Sandpiper*, 331 F.2d 130 (2d Cir. 1964), "leaving cases like *Arnstein* as mere momentos of law gone by." 6 J. MOORE, FEDERAL PRACTICE (2d Ed. 1980), ¶ 56.17[14]. We adopt Universal's argument on this point. U.Br. at 20-21. Even the *Arnstein* test could not prevent a court from (App. A-13 n.6) rejecting "patently frivolous" claims.

knowledge and ideas. *Eichel v. Marcin*, 214 F. 404, 410 (S.D.N.Y. 1913); *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390-91 (C.D. Cal. 1977). Even the "financial reward guaranteed to the copyright holder is but an incident of this general objective," *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543-44 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). In achieving this goal, it is fundamental that "protection is given only to the expression of the idea—not the idea itself," *Mazer v. Stein*, 347 U.S. 201, 217 (1954). Hence, as Congress has recently reminded us, like its predecessor the 1976 Copyright Act:

> ". . . *does not preclude others from using the ideas or information revealed by the author's work.* It pertains to the literary, musical, graphic, or artistic *form* in which the author expressed intellectual concepts. . . . [*C*]*opyright protection does not extend to any idea . . ., concept, principle, or discovery,* regardless of the form in which it is described, explained, illustrated, or embodied in such work." [Emphasis added.]

H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 56-57, 5 U.S. CODE CONG. & ADM. NEWS (1976) 5659, 5670. The courts below precisely followed—and petitioner's claims directly contravene—these fundamental principles.

A. Ideas And Theories Cannot Be Copyrighted.

Time and again this Court and other courts have applied the basic principle that ideas as such—particularly historical ideas and theories—are not protectible. "The familiar test of copyrightability distinguishes between the 'ideas' used by the author and his 'expression' of them. Only the latter is said to be copyrightable. *Holmes v. Hurst*, 174 U.S. 82, 86, 19 S.Ct.

606, 43 L.Ed. 904 (1899)." *Burnett v. Lambino*, 204 F.Supp. 327, 330 (S.D.N.Y. 1962). "An author may have no monopoly upon any theory propounded by him, or in the speculations by which he has supported it, nor even in the use of the published results of his own observation. *Baker v. Selden*, 101 U.S. 99 [, 102-04 (1879)]; *Bauer v. O'Donnell*, 229 U.S 1 [, 13-15 (1913)]." *Eichel v. Marcin*, 241 F. 404, 410-11 (S.D.N.Y. 1913). "In the literary field this rule means that themes and plots are not protected. *Shipman v. RKO Pictures*, 100 F.2d 533, 538 (2d Cir. 1938)." *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390 (C.D. Cal. 1977). See *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Musto v. Meyer*, 434 F.Supp. 32, 36 (S.D.N.Y. 1977), *aff'd without op.*, 598 F.2d 609 (2d Cir. 1979).

Here petitioner, both in the courts below (see JA 284, SA 25) and in this Court (*Pet.* at 3), complains that respondents used his "literary idea and concept" or his "historical interpretation," in the form of the Spehl theory. That is the centerpiece of his claim; he concedes that Mooney wrote "a different book" from his, JA 1040, unlike his in "overall feel" (see *Reyher v. Children's Television Workshop*, 533 F.2d 87, 92 (2d Cir. 1976)), "style," and "treatment." But as the Court of Appeals observed, App. A-12 to A-13 (quoted at page 5, *supra*), the Spehl theory "is based entirely on the interpretation of historical facts." Petitioner cannot copyright either those historical facts, *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938), or the ideas, interpretations, or inferences to which they give rise. *Greenbie v. Noble*, 151 F.Supp. 45, 50, 71 (S.D.N.Y. 1957) ("reasonable inferences . . . from historical events"); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 577-78 n.13 (1977) ("ideas" and "concepts"); *Eichel v. Marcin*, 241 F. 404, 410-11 (S.D.N.Y. 1913).

Spehl, his girlfriend, their anti-Nazi connections, and the other elements of petitioner's theory are history. See pages 3-4, *supra*. The inference to which those facts give rise is not petitioner's alone; both the Gestapo and the Hindenburg's crew harbored similar suspicions. See pages 3-4, *supra*.[12] The "sabotage-by-Spehl" idea itself was given to plaintiff by Klaus Pruss. See page 4, n.4, *supra*. But even if petitioner had lucubrated these things on his own, they cannot form the basis for an infringement claim. To hold otherwise would not only overturn basic and long-settled principles of copyright law, but also (as the Court of Appeals observed, App. A-2 to A-3, A-12, A-15 to A-16) risk chilling and retarding the progress of historical writing. That would be directly contrary to the purposes of copyright protection. *Eichel v. Marcin*, 241 F. 404, 408-09 (S.D.N.Y. 1913); *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390-91 (C.D. Cal. 1977); *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935).

B. Facts, History, And Stock Literary Devices Cannot Be Copyrighted.

Apart from the Spehl theory (dealt with above) and "many" "patently frivolous" allegations (App. A-13 n.6), the courts below found that the "vast majority" of

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[12] Years before Mooney's book was written, in fact, another author asserted that the Gestapo ultimately "narrow[ed] their investigation down to one man, rigger Eric Spehl." TITLER, WINGS OF MYSTERY 250. Titler (whose book Mooney read at the outset of his own labors, well before he encountered petitioner's: JA 507-09, 843, 845) has since said that he too obtained the Spehl theory from petitioner. But as the Court of Appeals observed, App. A-4 n.1, petitioner has never taken any action against Titler (JA 279); and Titler's reference to the Gestapo's focus on Spehl does not appear in petitioner's book.

petitioner's claims concerned either alleged copying of historical facts—which petitioner admits, JA 823-25—or "random duplications of phrases and sequences of events" and "standard literary devices," App. A-13 n.6, A-14 to A-15, A-20 to A-22.[13] As with petitioner's ideas and historical theories, it has long been settled that such things are simply not copyrightable.

To begin with, "[t]here is no copyright of facts, news or history," *Greenbie v. Noble*, 151 F.Supp. 45, 66 (S.D.N.Y. 1957), and no "monopoly in the narration of historical events," *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). As Judge Learned Hand trenchantly observed in *Myers v. Mail & Express Co.*, 36

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[13] See pages 7-9, *supra*, and page 22 n.16, *infra*. It may be noted that the list of claims on which both courts ruled was petitioner's fourth attempt. His first (stricken on motion, JA 1042-45) was riddled with wholly fictitious "comparisons" achieved by cutting and pasting unrelated passages together to create the false impression of a single passage; for example, one claim combined—without indication, and in reverse order—two passages from two pages of petitioner's book 36 pages apart. See JA 856-58. Petitioner's next attempt (of which his third was a revision) claimed 347 "similarities," of which 191 lacked any reference at all to Mooney's book even though most claimed copying of "literal expression" or "selection and arrangement of words;" petitioner admitted that he could not explain those charges. JA 812; see JA 1046-47. As to the disjointed manner in which petitioner's final attempt jumped around through his book (see page 9, *supra*), we note that "[s]imilarity may not be shown . . . by an analysis which alters the actual sequence or construction of plaintiff's work," 3 NIMMER ON COPYRIGHT (Rev. Ed. 1980), § 13.03[E][3]. And petitioner's persistent attempt to base claims on Mooney's *notes* or *outlines* (see page 8 n.6, *supra*) is both disingenuous and improper. It is the book, not notes or drafts or outlines, on which any claim must rest. *Cain v. Universal Pictures Co.*, 47 F.Supp. 1013, 1017-18 (S.D. Cal. 1942); *Fuld v. National Broadcasting Co., Inc.*, 390 F.Supp. 877, 882 n.4 (S.D.N.Y. 1975). See U.Br. at 17-18.

C.O.Bull. 478, 479 (S.D.N.Y. 1919), quoted in *Norman v. Columbia Broadcasting System, Inc.*, 333 F.Supp. 788, 796-97 (S.D.N.Y. 1971):

> "[N]ot only are all the facts recorded in a history in the public domain, but, since the narration of history must proceed chronologically,—or at least, such is the convention,—the order in which the facts are reported must be the same in the case of a second supposed author. There cannot be any such thing as copyright in the order of presentation of the facts, nor, indeed, in their selection. . . ."

Case after case has so held. A narration of history unavoidably imposes its own rigors; "[t]he subject matter is of necessity what events have made it and the order of treatment whether that be chronological or topical is fixed by the facts." *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938). Those facts are not petitioner's property; nor may he "build a story around a historical incident and then claim exclusive right to the use of the incident." *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935); *Fuld v. National Broadcasting Co., Inc.*, 390 F.Supp. 877, 881 (S.D.N.Y. 1975); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977).

And this extends as much to "stock" situations and *scenes a faire*—sequences or patterns "which necessarily must follow from the handling of similar plot situations," *Miller Brewing Co. v. Carling O'Keefe Breweries*, 452 F.Supp. 429, 439 (W.D.N.Y. 1978), or similar historical events, *Huie v. National Broadcasting Co., Inc.*, 184 F.Supp. 198, 200 (S.D.N.Y. 1960)—as it does to the historical facts themselves. Even in fiction works, such *scenes a faire* are not protectible. Yankwich, "Originality In The Law Of Intellectual Property," 11

F.R.D. 457, 462 (1951); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91-92 (2d Cir. 1976); *Cain v. Universal Pictures Co.*, 47 F.Supp. 1013, 1017 (S.D. Cal. 1942). *A fortiori* they are not protectible here, where they are dictated not only by literary convention but by the compulsion of history as well. In works describing the same historical persons or events, such similarities are "inevitable" and not actionable. *Alexander v. Irving Trust Co.*, 132 F.Supp. 364, 367 (S.D.N.Y. 1955), *aff'd per cur. on op. below*, 228 F.2d 221 (2d Cir. 1955), *cert. denied*, 350 U.S. 996 (1956); *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938). They are not the subject matter of copyright, any more than "words or phrases isolated from their context" or "usual English idioms." *Lewys v. O'Neill*, 49 F.2d 603, 611-12 (S.D.N.Y. 1931); *O'Brien v. Chappel & Co.*, 159 F.Supp. 58, 59 (S.D.N.Y. 1958).

Hence it has been repeatedly held that:

> ". . . mere similarity of phraseology does not amount to an infringement since a copyright does not protect words and phrases as such. [Citations omitted.] Moreover, similarities of incidents alone will not constitute an infringement [citations omitted], especially where both works are based on common sources and concern events in the life of an historic figure. [Citations omitted.]"

Greenbie v. Noble, 151 F.Supp. 45, 69 (S.D.N.Y. 1957). The principle is straightforward. "When a book is designed to convey information, a reader is entitled to avail himself of the facts contained therein . . . in his own literary work, provided that his expression and treatment is distinctly his own. . . ." *Id.* at 57; see *Oxford Book Co. v. College Entrance Book Co.*, 98 F.2d 688, 691 (2d Cir. 1938), and *Chautauqua School of Nursing v. National School of Nursing*, 238 F. 151, 153 (2d Cir.

1916). Thus "the copyright in a book dealing with factual matters will not be infringed by a work that copies such facts, but in a manner in which the particular verbal description of such facts is not copied," 3 NIMMER ON COPYRIGHT (Rev.Ed. 1980), § 13.03[A]; and one may freely check and correct the accuracy of one's own facts by consulting other published works on the same subject, even making corrections from the other works. 2 *Id.*, § 8.01[E].

Of course it makes no difference that the first author may (as petitioner claims here) have unearthed the fact in question through his own research. "Facts may be discovered, but they are not created by an act of authorship." 1 NIMMER ON COPYRIGHT (Rev.Ed. 1980), § 2.11[A]. Thus (*Id.*, § 2.03[E]):

> "The 'discoverer' of . . . an historical fact, a contemporary news event, or any other 'fact,' may not claim to be the 'author' of that fact. . . . The discoverer merely finds and records. He may not claim that the facts are 'original' with him, although there may be originality and hence authorship in the manner of reporting, i.e., the 'expression,' of the facts. . . . [I]t follows that quite apart from their status as 'ideas', discoveries as facts per se may not be the subject of copyright."

This is why, as Congress recently emphasized, the Copyright Act "does not preclude others from using the ideas or information revealed by the author's work," and "does not extend to any . . . discovery. . . ." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) at 56-57, 5 U.S. CODE CONG. & ADM. NEWS (1976) 5659, 5670. As the Court of Appeals below explained fourteen years ago in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009

(1967), one cannot override that "proscription against copyright of ideas and facts," nor withdraw historical events from the common store of knowledge, simply by branding one's efforts "research."

C. There Is No Conflict Among The Circuits.

We have seen that all of these principles are settled law. Petitioner's attempts to imply that they are novel (*e.g.*, *Pet.* at 24), and to establish a "conflict" between the decisions below and other cases (*Id.* at 24-30), are misplaced. Most of his supposed "conflicts" concern decisions within the Second Circuit itself, including several discussed in the Court of Appeals' opinion here; these hardly require analysis.[14] The only other Court of Appeals decisions petitioner offers are *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664 (7th Cir. 1950), and *Bradbury v. Columbia Broadcasting System*, 287 F.2d 478 (9th Cir. 1961). But neither those decisions nor the law in their respective Circuits conflicts at all with the rulings below.

The Seventh Circuit has interpreted *Toksvig* as involving a "fair use" issue (not presented here: see page 10, *supra*). *Eisenschiml v. Fawcett Publications, Inc.*, 246 F.2d 598, 603 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957). Certainly *Toksvig* did not hold that ideas or facts

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[14] See, *e.g.*, App. A-11 to A-12, concerning *Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936), and *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F.2d 432 (2d Cir. 1940), and App. A-15, concerning *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). It may be noted that petitioner did not seek rehearing, either by the Panel or *en banc*, in the Court of Appeals.

could be copyrighted. Both in *Eisenschiml, supra,* 246 F.2d at 603, and in *Becker v. Loew's Inc.,* 133 F.2d 889, 891 (7th Cir.), *cert. denied,* 319 U.S. 772 (1943), the Seventh Circuit made it plain that, as *Becker* held, no author can "withdraw . . . ideas or conceptions from the stock of material to be used by other[s];" and *Toksvig* itself is read as reaffirming that "the facts about a historical figure are available to all to use," so long as the "expression" of the facts is not appropriated. *Sid & Marty Krofft TV Productions, Inc. v. McDonalds Corp.,* 562 F.2d 1157, 1170 (9th Cir. 1977).[15]

Petitioner's reliance on *Bradbury v. Columbia Broadcasting System,* 287 F.2d 478 (9th Cir. 1961), is equally misplaced. *Bradbury* involved a work of fiction (the novel "Fahrenheit 451"), not historical facts and theories. See App. A-11 to A-12. Like the Seventh Circuit, the Ninth Circuit has no difficulty with the established principle that historical facts, theories, and ideas are not copyrightable. *Sid & Marty Krofft TV Productions, Inc. v. McDonalds Corp.,* 562 F.2d 1157, 1170 (9th Cir. 1977);

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[15] *Toksvig* itself evidently involved a copying of "expression;" it held that "if plaintiff has established that the passages in question *were original with her,* then their appropriation constituted infringement." 181 F.2d at 667 (emphasis added). It may be noted that in the twenty-three years since *Eisenschiml, supra,* which distinguished *Toksvig* and held for a defendant who admitted using plaintiff's historical ideas and "themes," *Toksvig* has not been cited once by the Court of Appeals in its own Circuit. It has been cited only three times by other Courts of Appeals: in *McDonalds Corp., supra;* in *Public Affairs Assocs., Inc. v. Rickover,* 284 F.2d 262, 272 n.34 (D.C. Cir. 1960), *vac. and rem.,* 369 U.S. 111 (1962) (on "fair use"); and in *Rosemont Enterprises, Inc. v. Random House, Inc.,* 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967), where the Second Circuit, reading *Toksvig* expansively, nevertheless refused to "subscribe to the view that an author is absolutely precluded from saving time and effort by . . . relying upon prior published material."

see also *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1389-90 (C.D. Cal. 1977), and the oft-cited decision of Judge Yankwich in *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935).

II.

COMMON-LAW PROTECTION CANNOT BE CONFERRED UPON MATERIAL WHICH THE COPYRIGHT LAWS PLACE IN THE PUBLIC DOMAIN.

In *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964), this Court held:

> "Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection *of a kind that clashes with the objectives of the federal patent laws.*" [Emphasis added.]

In *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964), the Court explained the point further:

> "Today we have held in *Sears* . . ., that when an article is unprotected by a patent *or a copyright*, state law may not forbid others to copy that article. To forbid copying would interfere with *the federal policy*, found in Art. I, § 8, cl. 8, of the Constitution . . ., *of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.*" [Emphasis added.]

Here it has long been settled, as a matter of affirmative federal policy under the copyright laws, that historical facts, theories, and ideas are in the public domain, free for all to use. See pages 11-19, *supra*.

To permit an author to bar others from using the historical facts, inferences, and theories about which he

wrote—which is what petitioner seeks to do here[16]—would be directly contrary to the purposes of copyright protection. *Echevarria v. Warner Bros. Pictures, Inc.*, 12 F.Supp. 632, 638 (S.D. Cal. 1935); *Midas Productions, Inc. v. Baer*, 437 F.Supp. 1388, 1390-91 (C.D. Cal. 1977); see pages 11-12, *supra*. It would promote not "the Progress of . . . useful Arts," Constitution, Art. I, § 8, cl. 8, but wasteful duplication of effort, since each author would have to begin anew, unable to build upon the work of his predecessors. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 309-10 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

As the courts below held, App. A-16, A-22, this Court's *Sears* and *Compco* decisions plainly preclude protection, through the "back door" of an unjust enrichment claim, of the historical facts, theories, and ideas which settled federal policy has long held to be in the public domain. Petitioner's reliance on *Goldstein v. California*, 412 U.S. 546 (1972), is misplaced.[17] *Goldstein* reaffirmed *Sears* and *Compco*. It merely held that the states were not precluded from protection *where no "federal policy" could be found* (412 U.S. at 571):

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[16] Petitioner made this quite clear below. See, *e.g.*, JA 819: "Q. . . . If there is a fact in your book and the same fact in Mr. Mooney's book, even though there is a common source for that, you say that's a taking of literary expression? A. I answered you, yes. Q. Okay, Mr. Hoehling, if Mr. Mooney reads a fact in your book and goes on to expand that fact by independent research, do you claim that violates your rights? A. Yes."

[17] Petitioner also cites *International News Service v. Associated Press*, 248 U.S. 215 (1918), which is in no way apposite here. That case dealt with competing news organizations' rights in "hot news," as did the portion of the House Report quoted at *Petition*, p. 43. The settled principles on which this case turns were not involved.

> ". . . [W]e have concluded that our decisions in *Sears* and *Compco*, which we reaffirm today, have no application in the present case, since *Congress has indicated neither that it wishes to protect, nor to free from protection,* recordings . . . fixed prior to February 15, 1972." [Emphasis added.]

That is not this case. Here there *is* a settled federal policy, established for over half a century and recently reaffirmed by Congress (see pages 11-12, *supra*), placing historical facts, ideas, and theories in the public domain. No more need be said.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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